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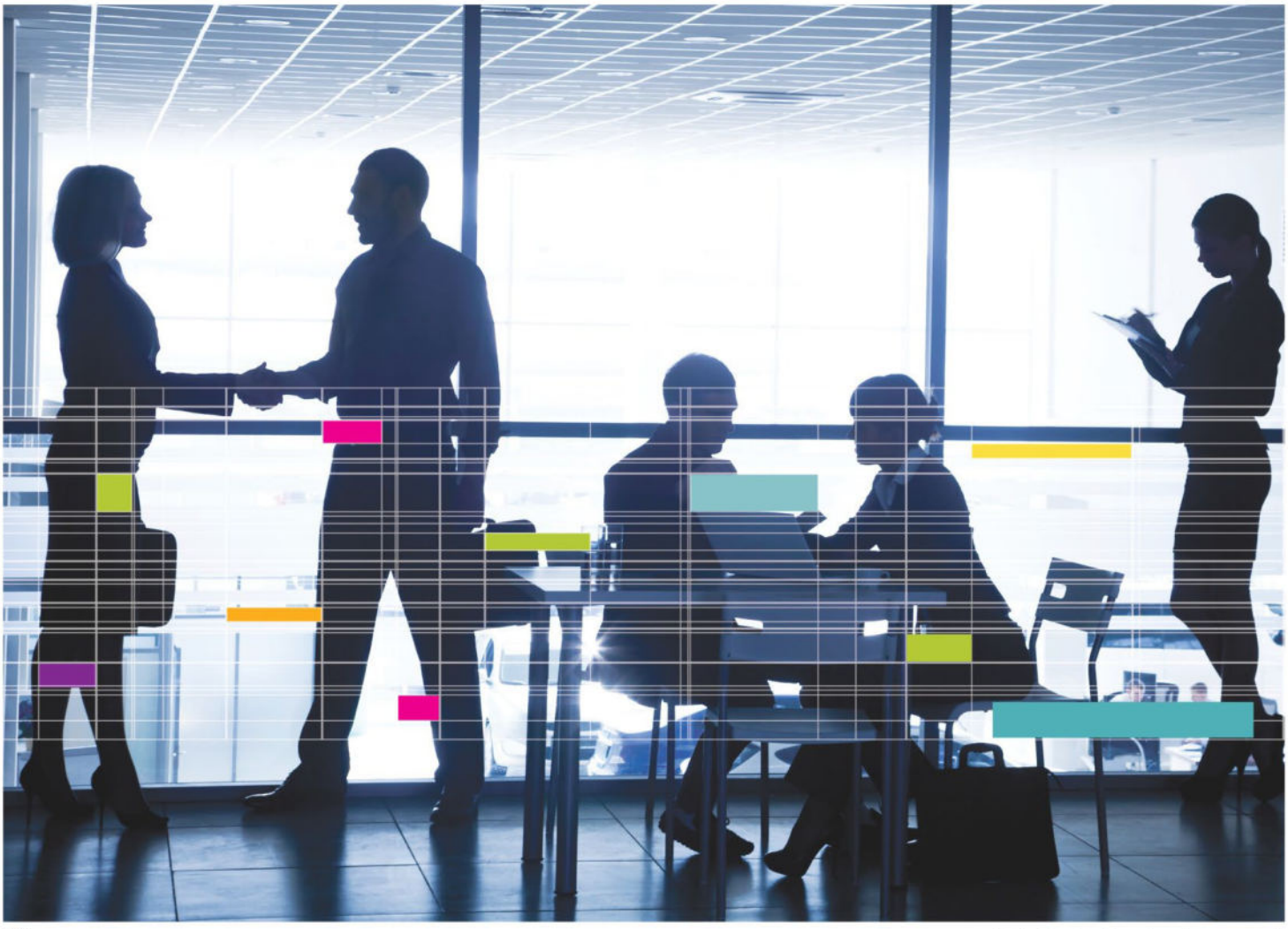
HANDLING MISCONDUCT:

a human resource manager's guide



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Preface

Employees of the Australian Public Service (APS) occupy a position of trust. They are entrusted by the Government and the community to undertake important work on their behalf. With this trust comes a high level of responsibility which should be matched by the highest standards of ethical behaviour from each APS employee.

Together the APS Values, the APS Employment Principles and the APS Code of Conduct set out the standard of behaviour expected of agency heads and APS employees. They provide the public with confidence in the way public servants behave, including in their exercise of authority when meeting government objectives.

Most public servants meet these standards most of the time. Sometimes, however, APS employees do not act in a way that is consistent with expectations.

This guide, *Handling Misconduct*, is designed to support managers to take the most appropriate action at every stage of the misconduct process. This includes when unacceptable behaviour by APS employees is first identified through to terminating their employment where that is justified.

The guide draws from experience with managing Code of Conduct inquiries in the APS. It suggests good practices for agencies to help them reach decisions that are fair, transparent, and robust. Fair decisions ensure that APS employees and the community at large can have confidence in the fairness of our processes, and that decisions are well grounded and properly made.

This is the second edition of *Handling Misconduct*, replacing the edition first published in 2007. It has been revised extensively to take account of amendments to the *Public Service Act 1999* that came into effect on 1 July 2013 and 1 July 2014.

I am grateful to the Merit Protection Commissioner, the Departments of Defence, Finance, Health, and Human Services, the Australian Taxation Office, the Australian Trade Commission and the Australian Government Solicitor for their assistance with the development of this guide.

John Lloyd PSM
Australian Public Service Commissioner

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Part I: Handling misconduct—Getting started

1. Introduction

1.1 Purpose

1.1.1 This guide, *Handling Misconduct*, is aimed at assisting Australian Public Service (APS) agencies to develop a timely and effective approach to managing suspected and proven misconduct.

1.1.2 Agencies are encouraged to use the information in this guide to develop their guidance material. The better practice advice, sample procedures and checklists are not intended to be prescriptive and can be used to inform agency guidance material and procedures.

1.2 Structure

1.2.1 *Handling Misconduct* comprises three parts and appendices:

a. Part I, Sections 1–3 outlines the legislative framework, the context and key concepts applying to reporting and dealing with suspected misconduct i.e. suspected breaches of the APS Code of Conduct (the Code).

b. Part II, Sections 4–7 contains good practice advice on reporting and managing suspected misconduct, from the time an allegation is received to the imposition of sanctions. Part II is the core of this guide and steps through the key stages of the process.

c. Part III, Sections 8–10 contains good practice advice on associated processes, such as record-keeping, review of decisions and quality assurance mechanisms.

1.2.2 The appendices to *Handling Misconduct* provide further information including:

a. information on the application of the Code to statutory office holders

b. an example of agency procedures under s15(3) of the *Public Service Act 1999* (PS Act)

c. information on the interaction between the Code and the *Public Interest Disclosure Act 2013*

d. information on the relationship between the Code and the duties of officials in the *Public Governance, Performance and Accountability Act 2013*

e. information on each element of the Code

f. tips and traps when selecting an external investigator

g. a checklist for consideration of incidents or reports of suspected misconduct when first identified

h. a checklist for decision-makers when considering suspending employees

i. a checklist for decision-makers making determinations of a breach of the Code

j. a checklist for decision-makers imposing a sanction.

1.3 Terminology

1.3.1 Terms used in this guide have the same meanings as set out in s7 of the PS Act and subordinate legislation. Where the legislation does not define terms used in this guide, they have the following meanings:

- **'assignment of duties'** means the action of the agency head, under s25 of the PS Act, in determining the duties of an employee and the place or places where the duties are to be performed. A related action is the 're-assignment of duties' which is one of the sanctions available under s15 of the PS Act
- **'breach decision-maker'** means the person selected under the agency's s15(3) procedures to determine whether or not a breach of the Code has occurred
- **'determination'** means a decision made by the breach decision-maker under the agency s15(3) procedures about whether an APS employee was found to have breached the Code
- **'employee'** means a person employed under the PS Act. It may include former employees who are or have been the subject of an investigation under an agency's s15(3) procedures in relation to action(s) while they were employed under the PS Act
- **'misconduct'** means conduct by a person while an APS employee that is determined under s15(3) procedures to be in breach of the Code. Before such a determination is made, the conduct is referred to as 'suspected' or 'alleged' misconduct
- **'misconduct action'** or **'misconduct process'** refers to those processes and decisions, in relation to an individual, that an agency carries out in accordance with its s15(3) procedures
- **'movement'** means a voluntary move of an ongoing employee between agencies under s26 of the PS Act
- '**must'** is used where an action is a requirement in the PS Act, *Public Service Regulations 1999* (PS Regulations), *Australian Public Service Commissioner's Directions 2016* or other law
- '**public interest disclosure'** or 'PID' has the same meaning as in the *Public Interest Disclosure Act 2013*
- '**s15(3) procedures'** means the procedures established by the agency head in accordance with s15(3) of the PS Act for determining whether an APS employee, or former employee, in the agency has breached the Code and the sanctions, if any, that are to be imposed where a breach of the Code has been determined
- **'sanction'** means one of the actions set out in s15(1) of the PS Act

- **'sanction decision-maker'** means the person who is the delegate of the agency head under s15(1) of the PS Act for the purpose of deciding sanction
- **'should'** indicates good practice
- **'suspension'** means the action of standing an employee down from their duties for a suspected breach of the Code, as set out in s28 of the PS Act and regulation 3.10 of the PS Regulations
- **'suspension decision-maker'** means the person who is the delegate of the agency head under regulation 3.10 of the PS Regulations for the purpose of deciding whether an employee should be suspended from duty**.**

1.4 Further information

1.4.1 Further information on the APS Values, Employment Principles and the Code is available from the Australian Public Service Commission's (the Commission) website at www.apsc.gov.au and from the Ethics Advisory Service on 02 6202 3737 and ethics@apsc.gov.au.

1.4.2 This guide complements other Commission publications and advice relating to the behaviour expected of APS employees, particularly *APS Values and Code of Conduct in practice.*[1]

1.4.3 Other useful sources of information on issues relating to misconduct include:

- material on privacy on the website of the Office of the Australian Information Commissioner
- legal briefings from law firms
- published decisions of courts and the Fair Work Commission
- the Merit Protection Commissioner's case summaries published on the APS Commission website.[2]

1.5 Legal advice on the Public Service Act

1.5.1 Agencies are asked to contact the Legal Services Team in the Commission at legal@apsc.gov.au when obtaining legal advice on the PS Act. Agencies are to forward copies of legal advice they obtain to the Commission, consistent with clause 10 of the *Legal Services Directions 2017*.

1.6 Disclaimer

[1] See http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct

[2] See http://meritprotectioncommission.gov.au/mpc-resources/summaries-of-cases-folder/case-summaries

1.6.1 The Commission has used its best endeavours to ensure the accuracy of the material at the time of writing, and will update the document from time to time. Agencies will be notified of any significant changes to the misconduct framework through the Commission's website as they arise.

1.6.2 However, the Commission is unable to guarantee that this guide is complete, correct and up-to-date, or that it is relevant to the particular circumstances of any matter. Agencies may wish to consider obtaining legal advice before making a decision if they are uncertain of their obligations.

2. Legislative Framework

2.1 Legislative framework

2.1.1 The legislative framework for handling suspected misconduct in the Australian Public Service (APS) includes a number of components. The main legislative base is the *Public Service Act 1999* (PS Act).

Public Service Act

2.1.2 Together the APS Values (s10 of the PS Act), the APS Employment Principles (s10A of the PS Act), and the APS Code of Conduct (the Code) (s13 of the PS Act and regulation 2.1 of the *Public Service Regulations 1999* (the PS Regulations)) set out the standards of conduct required of APS employees. The APS Values set out the standards and outcomes that are expected of APS employees while the APS Employment Principles broadly guide employment and workplace relationships in the APS. The Code sets out the behaviour expected of individual APS employees. These statements of expected standards help to shape the APS organisational culture.

2.1.3 The PS Act, the PS Regulations, and the *Australian Public Service Commissioner's Directions 2016* (the Directions) are available on the Federal Register of Legislation website.[3]

2.1.4 The Code applies to:

- all APS employees engaged under the PS Act i.e. ongoing and non-ongoing employees and heads of overseas missions (ss7, 13, and 39 of the PS Act)
    - it does not apply to locally engaged employees in overseas missions
- all agency heads, including secretaries of departments, heads of executive agencies and heads of statutory agencies (s14(1) of the PS Act)
- certain statutory office holders to the extent that they supervise, or have a day-to-day working relationship with, APS employees (s14 of the PS Act and regulation 2.2 of the PS Regulations). Further information can be found in Appendix 1 *Statutory officer holders and the Australian Public Service Code of Conduct* of this guide.

2.1.5 In addition, the Code extends to behaviour when applying for employment in the APS. Under s15(2A) of the PS Act an APS employee can be found to have breached the Code if they provided false and misleading information, wilfully failed to disclose relevant

[3] https://www.legislation.gov.au/

information, or failed to act with honesty and with integrity in connection with their engagement as an APS employee.

Agency s15(3) Procedures

2.1.6 Section 15(3) of the PS Act requires agency heads to develop written procedures for determining:

- whether an employee, or former employee, in their agency has breached the Code
- the sanction, if any, that is to be imposed on an employee where a breach of the Code has been found.

2.1.7 If an employee is found to have breached the Code, an agency head may impose sanctions. The available sanctions are listed in s15(1) of the PS Act. However, a sanction cannot be imposed on former employees.

2.1.8 The procedures must comply with the basic procedural requirements contained in the Directions (s15(4)(a) of the PS Act and Part 5 of the Directions) and must have due regard to procedural fairness (s15(4)(b) of the PS Act). Section 15(4)(b) of the PS Act explicitly recognises that the administrative law principles of procedural fairness apply to the misconduct action process.

2.1.9 Most administrative decisions that affect the rights and interests of individuals need to be made in accordance with the rules of procedural fairness and other administrative law principles. See *Investigative Process* in Part II, Section 6 of this guide for further information.

2.1.10 Anyone given responsibility for investigating suspected misconduct, determining whether there has been a breach of the Code and imposing a sanction should have a good understanding of the procedural requirements for making a lawful administrative decision. The Administrative Review Council has published better practice guides on administrative decision-making which explain the elements of making sound and lawful administrative decisions. Those guides are available at www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx.

2.1.11 It is preferable for agency s15(3) procedures to include a statement about how the person who determines whether a breach has occurred is to be selected or otherwise identified. While an agency head may nominate any person to make that selection, it is generally good practice for agency s15(3) procedures to identify clearly at least one person or position who can select a decision-maker in each case.

2.1.12 Agency s15(3) procedures should be established as soon as practicable after the creation of a new agency. Where agencies are affected by machinery of government (MOG) changes, including a name change and/or changes to administrative functions, it would be prudent for agencies to remake their procedures to avoid any doubt about the validity of the procedures applied to suspected misconduct after the MOG changes.

2.1.13 The agency head must ensure that the agency's s15(3) procedures are made publicly available (s15(7) of the PS Act). Many agencies meet this requirement by posting their procedures on their websites.

Basic procedural requirements—Australian Public Service Commissioner's Directions

2.1.14 The Directions (Part 5) set out basic procedural requirements with which agency s15(3) procedures must comply. These basic procedural requirements are to the effect that:

- A determination may not be made in relation to a suspected breach of the Code unless reasonable steps have been taken to inform the employee, or former employee, of the details of the suspected breach and, for employees, the sanctions that may be imposed (section 43 of the Directions).
    - This includes providing the employee or former employee with information on any variation in the suspected breach.
- The employee or former employee must be given a reasonable opportunity to make a statement in relation to the suspected breach (section 43 of the Directions).
- If a determination is made that an employee has breached the Code a sanction may not be imposed unless reasonable steps have been taken to inform the employee of the determination and each sanction being considered. This means more than simply advising the employee of the range of sanctions available under s15(1) of the PS Act. The agency must also take reasonable steps to inform the employee of the factors that are being considered in deciding sanction and the employee must be given a reasonable opportunity to make a statement in relation to the sanctions under consideration (section 44 of the Directions). A sanction cannot be imposed on a former employee.
- Reasonable steps must be taken to ensure that a person who determines whether there was a breach of the Code and a person who decides any sanction is, and appears to be, independent and unbiased (section 45 of the Directions). More information on these roles is available in Part II, Sections 5 and 6 and checklists in the appendices of this guide.
    - Care needs to be taken in selecting and appointing or delegating people to these roles to ensure that decisions are not later invalidated owing to an incorrect appointment.
- The process for determining whether an APS employee, or former employee, has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows (section 46 of the Directions).
- If a determination is made in relation to a suspected breach of the Code, a written record must be made of the determination—whether the employee or former employee was found to have breached the Code or not. Where a breach is determined and a sanction imposed, a record must also be made of the sanction decision. If a statement of reasons

was given to the affected person, that statement must be included in the written record (section 47 of the Directions).

Directions relating to movement between agencies

2.1.15 Where an employee moves to a different agency while misconduct action is in train, the procedures of the losing agency no longer apply. If the misconduct action is to continue, it needs to do so under the procedures of the receiving agency. See Part II, Section 7.8 *Employee moves to another APS agency before a determination or a sanction is made* of this guide.

Other relevant legislation

2.1.16 Other legislation of relevance to handling suspected and proven misconduct include:

- *Administrative Decisions (Judicial Review) Act 1977*
- *Fair Work Act 2009*
- *Freedom of Information Act 1982*
- *Privacy Act 1988*
- *Public Interest Disclosure Act 2013*
- *Public Governance, Performance and Accountability Act 2013*
- *Work Health and Safety Act 2011.*

2.2 Developing s15(3) procedures and agency guidance material on handling misconduct

2.2.1 Taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the agency and the APS and thereby maintaining public confidence in public administration. Rather than seeking to punish the employee, an aim of misconduct action is to maintain proper standards of conduct by APS employees and protect the reputation of the APS. Sanctions are intended to be proportionate to the nature of the breach, to be a deterrent to others and to demonstrate that misconduct is not tolerated in the agency.

2.2.2 Agency s15(3) procedures, and any associated guidance material, need to strike an appropriate balance between the interests of employees, the agency as an employer and the public.

2.2.3 Agency s15(3) procedures must be consistent with the PS Act and the Directions.

2.2.4 Section 15(5) of the PS Act provides that agency procedures may include different procedures to deal with:

- different categories of employees, for example probationers
- determining breach for former employees
- determining breach for employees, or former employees, who have been found to have committed an offence against a Commonwealth, State or Territory law.

2.2.5 An agency's s15(3) procedures are often included in an appendix to agency guidance material. An example of agency s15(3) procedures can be found at Appendix 2 to this guide.

Compliance with agency procedures

2.2.6 Agencies are advised to emphasise to managers, decision-makers and delegates the importance of complying with the agency's s15(3) procedures. Failure to comply will leave the agency exposed to legal risk and, in particular, a risk that the breach decision and/or sanction decision may be challenged.

Flexible procedures

2.2.7 It is advisable that agencies keep their s15(3) procedures relatively brief and as flexible as possible while still meeting the legislative requirements. This will help minimise the risk that the decision-making process fails to comply with the s15(3) procedures. For example, it may be preferable not to mandate that the person under investigation must receive an oral hearing as it may not be possible to provide this in all cases. If agencies wish to provide practitioners and employees with detailed guidance, including good practice guidance, this can be included in separate guidance material.

Additional guidance material

2.2.8 An agency's s15(3) procedures can be accompanied by separate, more detailed guidance material, drawing on this guide. Alternatively, some agencies may prefer not to have separate guidance material, relying instead on this guide to fulfil that function.

2.2.9 Agencies should ensure that the guidance material avoids words that appear to impose mandatory requirements, such as 'must', unless this is intended and appropriate e.g. references to the mandatory requirements of the statutory framework.

2.3 Managing misconduct action consistent with privacy requirements

2.3.1 Misconduct action gathers personal information, as defined in s6(1) of the *Privacy Act 1988* (Privacy Act) about employees, former employees and other persons involved in the events associated with the suspected misconduct.

2.3.2 This personal information must be handled within the boundaries set by the Privacy Act, the PS Act and the PS Regulations. If the suspected misconduct came to light through a public interest disclosure under the *Public Interest Disclosure Act 2013* (PID Act) agencies must take account of the PID Act in dealing with personal information. For further information on the PID Act see the Commonwealth Ombudsman website www.ombudsman.gov.au/pages/pid/ and Appendix 3 of this guide.

2.3.3 The arrangements for the collection, storage, use and disclosure of information of this kind are subject to the Australian Privacy Principles in the Privacy Act. Advice from the Office of the Australian Information Commissioner is relevant to the development of

personal information handling practices. The use and disclosure of personal information collected by agencies in the context of their employer powers is facilitated by regulation 9.2 of the PS Regulations. Agencies must also have regard to any advice issued by the Australian Public Service Commissioner on the operation of regulation 9.2.

2.3.4 Agencies are advised to assess their misconduct management, investigation and decision-making processes in accordance with:

- the Privacy Commissioner's guidance on APP 3 (collection of solicited personal information), APP 4 (dealing with unsolicited personal information), APP 5 (notification of collection of personal information) and APP 6 (use or disclosure of personal information), and
- any guidance from the Australian Public Service Commissioner on regulation 9.2

to ensure that personal information is collected, used and disclosed lawfully.

2.3.5 Agencies may wish to consider whether to develop a specific privacy policy relating to the misconduct process and tools to support managers, human resource practitioners and decision-makers in handling personal information consistent with the agency's obligations under the Privacy Act.

3. Concepts and context

3.1 Obligation to uphold the Values, Employment Principles and Code

3.1.1 Australian Public Service (APS) agency heads and APS employees have obligations to act consistently with the APS Code of Conduct (the Code). Agency heads and Senior Executive Service employees have an additional duty to uphold and promote the APS Values and APS Employment Principles (s12 and s35(3)(c) of the *Public Service Act 1999* (PS Act)).

Other requirements

3.1.2 APS employees have a range of other legal obligations arising from administrative law, criminal law, and legislation that directs the administrative functions of the agency for which they work.

3.1.3 The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) is one area where direct links exist between specific legislative obligations and the Code. The PGPA Act provides, through the duties of officials, a set of expected behaviours necessary for high standards of governance, performance and accountability. See Appendix 4 *The Australian Public Service Code of Conduct and the and Public Governance, Performance and Accountability Act* for further information.

3.2 Agency guidance material on expected behaviour

3.2.1 Agencies have obligations to provide employees with guidance and training that covers how employees are expected to conduct themselves in the workplace. This includes the central role of the APS Values, APS Employment Principles and the Code and how employees can report suspected misconduct. Agencies also issue policies on related matters, such as prevention of bullying and harassment, information technology security, management of client and stakeholder relationships and conflicts of interest. Taken together agency policies, guidance and training assist employees to understand their obligations under the PS Act and other Acts.

3.2.2 The Commission's publication *APS Values and Code of Conduct in practice*[4] provides practical information and guidance to all employees on the application of the Values and the Code in APS employment.

3.3 Misconduct in the APS

[4] See http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct

3.3.1 Misconduct refers to any action or behaviour by employees which has been determined to have breached the Code. Until that point, any inappropriate action or behaviour by an employee is only 'suspected' or 'alleged' misconduct.

3.3.2 Most commonly, misconduct action involves the investigation of current APS employees for behaviours they engaged in as an APS employee. However, misconduct action can also be taken, in accordance with s15(2A) of the PS Act, when it is suspected that an APS employee provided false or misleading information, wilfully failed to disclose relevant information or failed to act with honesty and integrity in connection with engagement as an APS employee. In this context, the Code extends to a person's behaviour before they became an APS employee.

3.3.3 Misconduct action can also be taken in relation to former employees. Where a misconduct process has started and an employee leaves the APS, the agency may continue that process to determine whether there was any breach of the Code by the now former employee. In addition, an agency may start misconduct action against a former APS employee to determine whether that person engaged in misconduct while still an employee. Misconduct action can only be taken with respect to former employees who left the APS on or after 1 July 2013.[5] A sanction cannot be imposed on a former employee. Further information is provided in Part II, Section 5.3 *Suspected misconduct of former APS employees*.

Elements of the Code with multiple obligations

3.3.4 In broad terms, an APS employee whose conduct does not comply with an element of the Code can be found to have breached the Code. Where an element of the Code contains more than one obligation, it is not generally necessary for the employee to have failed to comply with all obligations in order for a breach of the Code to be found. For example, s13(3) of the PS Act states that an employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment. An employee who was found to be discourteous but not also found to have engaged in harassing behaviour could be found to have breached the Code. See Appendix 5 *Elements of the Australian Public Service Code of Conduct* for more information on the application of the Code.

Does intent matter?

3.3.5 A breach of the Code does not generally require intent. An employee will still breach the Code if they, for example, acted without respect or courtesy, whether they meant to or

[5] Reference to transitional provisions in the amendment act

not. The Code does not use words such as ‘wilful’ or ‘reckless’ or ‘negligent’ to qualify the behaviour involved—behaviour contrary to the particular section of the Code will suffice.

3.3.6 However, there is room for an honest and reasonable mistake which, depending on the circumstances, may be better dealt with through process improvements, training, performance management or counselling.

3.4 Agency-based codes of conduct or expected behaviours

3.4.1 Some agencies promulgate their own set of expected behaviours. For example, agencies may identify specific behavioural standards for employees based overseas or where the agency has both APS and non-APS employees.

3.4.2 When an employee infringes an agency-based set of expected behaviours, the agency needs to be able to link the behaviour in question to a particular element in the Code, if it is to form the basis of misconduct action. For example, where an agency-based set of behaviours is promulgated by way of lawful and reasonable directions by the agency head to all employees in the agency, an infringement can be enforced on the basis that it is a breach of s13(5) of the Code.

3.5 The connection between work and misconduct

3.5.1 The various elements of the Code specify different levels of connectedness between the standard of conduct required of an APS employee and their employment or are silent on the matter. Some elements of the Code apply to behaviours ‘in connection with employment’ and others apply ‘at all times’.

3.5.2 APS employees are entitled to a private life. However, the Code may apply to behaviours that, on their face, appear to be largely private owing to a connection between the behaviour and the agency’s confidence in the capacity of the employee to perform their duties professionally, and/or because of the possible impact of the behaviour on the reputation of the agency or the APS. Any misconduct action must carefully consider the relevant level of connectedness in determining whether there has been a breach of the Code.

In connection with APS employment

3.5.3 The term ‘in connection with employment’ is not confined to the performance of job-related tasks or other conduct in the course of employment. Employees are required to abide by the Code when engaged in activities outside work hours and away from the workplace where there is some connection with their APS employment. This includes for example, on work-related travel, during training, and, in certain circumstances, when using social media or other online forums.

At all times

3.5.4 The term ‘at all times’ is used in s13(11) and s13(12) of the Code and provides for a broader application to conduct outside of work hours than most other elements of the Code. The requirement that APS employees must at all times behave in a way that upholds the integrity and good reputation of the agency and the APS (s13(11) of the PS Act) can be read broadly. This is particularly relevant when employees chat online on publicly available personal social media pages or other public forums. It is therefore important that agencies have in place guidance material that will assist employees to understand their responsibilities and their agency’s expectations in relation to making public comment. Employees also need to understand the consequences if such comment breaches the Code. See also information on the connection between work and criminal acts in Part II, Section 3.7 *Suspected Misconduct that may also be a criminal act* of this guide.

3.5.5 Additionally, the requirement that an employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia (s13(12) of the PS Act) means that a broad range of activities by an APS employee while overseas on duty may fall within the provisions of the Code. An employee on duty overseas, that is on a posting or travelling for work purposes, is representing Australia and may be identifiable as an Australian Government employee even when not undertaking official duties.

3.6 Probation and the Code

3.6.1 Probationers are required to abide by the Code in the same way as other employees. Probationers who fail to adhere to behavioural and performance standards may have failed to meet a condition of their probation and in that circumstance there may be grounds for termination of employment under s29(3)(f) of the PS Act. Agencies may also manage concerns about the behaviour of a probationer as a suspected breach of the Code in accordance with their s15(3) procedures.

3.6.2 Agencies are advised to bring to a probationer’s attention on their engagement their obligations to uphold the APS Values, Employment Principles and comply with the Code as essential elements underpinning their employment in the APS.

3.6.3 Where it is suspected that a probationer may have breached the Code, the agency head can take action in accordance with agency procedures established under subsection 15(3) of the PS Act to investigate the matter immediately. The agency head may impose a sanction on a probationer where the employee is found to have breached the Code. If, as a result of an investigation, it is established that a serious breach of the Code has been committed by the employee, the agency head can terminate the engagement immediately, without waiting for the period of probation to run its normal course. As noted above, in establishing relevant procedures under s15(3) of the PS Act, agencies may need to consider whether they should provide for different misconduct provisions to apply to employees who are still serving a period of probation.

3.6.4 Further information is available from the Commission's website, www.apsc.gov.au

3.7 Suspected misconduct that may also be a criminal act

3.7.1 Criminal proceedings may result from an employee's behaviour in the workplace, or from his or her private actions. In both cases, agencies can face difficult judgements. These include whether or not to start a Code investigation when a criminal investigation or trial is underway or about to start.

3.7.2 Even where an employee's behaviour is found by an appropriate authority to be a criminal act, an agency head may consider investigating, under the agency's s15(3) procedures, whether that behaviour was also a breach of the Code. Circumstances in which this may occur include where the behaviour may:

- have an adverse effect on the employee's ability to carry out their duties, or
- have an adverse effect on the workplace, or
- bring the employee's agency or the APS into disrepute.

Handling reports of criminal acts

3.7.3 Agencies are advised to have clear processes for receiving and dealing with reports of a breach or suspected breach of the criminal law by their employees, including self-reporting by employees.

3.7.4 Agencies are required under the *Public Interest Disclosure Act 2013* (PID Act) to establish procedures for dealing with disclosures made under that Act. It is open to employees when they become aware of a suspected breach of the criminal law by another employee to make a public interest disclosure consistent with the procedures established by their agency. Should an investigator in the course of an investigation under the PID Act suspect that the disclosure includes an offence against a law of the Commonwealth that may be punishable by imprisonment for a period of at least two years, the investigator must notify a member of an Australian police force of that suspected offence.[6.]

3.7.5 Agencies also have obligations relating to receiving and dealing with reports of suspected breaches of the criminal law under the Australian Government's Protective Security Policy Framework.[7]

3.7.6 If an agency, or an employee, wishes to report a suspected breach of the criminal law directly to the relevant law enforcement agency, they will need to consider which enforcement agency is appropriate. Whilst many crimes against the Commonwealth are dealt with by the Australian Federal Police (AFP), there may be

[6] See s56 of the PID Act

[7] See https://www.protectivesecurity.gov.au/Pages/default.aspx

cases where State or Territory law applies and suspected breaches may need to be reported to other law enforcement agencies.

3.7.7 The AFP has primary responsibility for investigating serious or complex crimes, including fraud, against the Commonwealth. Generally allegations of serious crime against the Commonwealth are to be referred to the AFP who will determine whether it will investigate the matter.[8] The AFP may recommend a joint investigation with the agency or other law enforcement agencies. Some agencies may have obligations to refer such matters to the Australian Commission for Law Enforcement Integrity.

3.7.8 Where there is doubt about to whom suspected breaches of the criminal law are to be reported, agencies can consult the AFP or State or Territory police or seek legal advice. The AFP has published advice on its website about the type of criminal incidents that can be reported to the AFP or the State/Territory police.[9]

Managing suspected criminal acts by employees

3.7.9 When an agency becomes aware that the police are investigating a suspected breach of the criminal law, or a prosecution is being conducted by a State/Territory prosecution authority or the Commonwealth Director of Public Prosecutions (CDPP), advice should be sought from the police or the prosecuting authority before starting, or continuing with, a Code investigation.

3.7.10 Where the agency becomes aware of possible criminal behaviour by an employee, the agency has three main options:

- referring the matter to the AFP, other Commonwealth investigatory agency or relevant State/Territory law enforcement agency[10]
- conducting an internal investigation, such as a fraud investigation, if the agency has the relevant authority and expertise. The internal investigation may result in referral of the findings to the CDPP for consideration of prosecution. [11]
    - This option may be appropriate where, for example, the AFP has decided not to investigate the matter but the agency considers the matter serious enough for investigation.

[8] See also the *Fraud Control Framework for the Commonwealth* at https://www.ag.gov.au/CrimeAndCorruption/FraudControl/Pages/FraudControlFramework.aspx for further information on fraud control.
[9] See www.afp.gov.au/contact/report-a-crime
[10] There may be legal obligations to report criminal acts to the AFP or similar authority.
[11] The CDPP *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf

- conducting an investigation into the allegation as a suspected breach of the Code under agency s15(3) procedures
    - a misconduct investigation may precede, be concurrent with, or subsequent to a criminal investigation.
    - a misconduct investigation may be an alternative to a criminal investigation for allegations about less serious criminal acts. If it becomes evident during the investigation that the matter is of a more serious nature, agencies may refer the matter to the relevant law enforcement agency.

If the criminal act is also a suspected breach of the Code

Delaying Code of Conduct action during criminal proceedings or investigations

3.7.11 Where an employee's behaviour may be both a breach of the Code and a criminal offence, agencies need not delay taking misconduct action until criminal processes have been completed.[12] However, care should be taken not to prejudice any criminal investigations or prosecutions.

3.7.12 Agencies would generally not proceed with a Code investigation if the police, another investigatory body, or the prosecuting authority, has advised them that misconduct action may prejudice criminal proceedings or investigations.

3.7.13 If there is a risk of prejudicing the criminal proceedings or investigation, agencies may

- put the employee on notice that action under the agency's s15(3) procedures is being considered but not start that action, or
- start action under the agency's s15(3) procedures but then put that action on hold while the criminal investigation is undertaken,
- decide whether to suspend the employee for a period of time until circumstances are clearer or criminal proceedings are finalised. See Part II, Section 5.8 of this guide for further information on suspension arrangements
- liaise with the investigatory body on the appropriate collection and security of evidence.

A criminal conviction may not be a breach of the Code

3.7.14 A finding by a court or authority that an APS employee has been convicted of a criminal offence does not automatically mean the employee has also breached the Code. Each case will need to be considered on its merits, and a decision made as to whether an

[12] *Baker v Commissioner* AFP (2000) 104 FCR 359; *Elliot v APRA* [2004] FCA 586; *Sullivan v Secretary, Defence* [2005] FCA 786.

investigation under an agency's s15(3) procedures is warranted. In undertaking such an investigation, a breach decision-maker cannot simply adopt findings of fact made by courts without testing them, given the obligation to provide procedural fairness to the employee. When deciding whether to inquire into an employee's behaviour as a potential breach of the Code in these circumstances, agencies should consider the following factors. Further information is also provided in Appendix 5 to this guide.

- Is there a relationship between the criminal act and the employee's employment?
    - APS employees are also citizens and, like all other employees, are entitled to a private life. Some criminal acts committed in a private capacity will not warrant consideration under an agency's s15(3) procedures where they are not relevant to, or have no impact on, the employee's employment or workplace. For example, a criminal conviction for drink driving outside the workplace, which did not result in a custodial sentence and where the employee is not required to drive a car as part of their duties, is unlikely to have sufficient relationship with the employee's employment to warrant consideration as a suspected breach of the Code.
- Has the conviction affected the employee's ability to carry out their duties/role?
    - This may include an employee's suitability to hold a security clearance.
    - The Australian Government Security Vetting Agency (AGSVA) must be advised of criminal activities by employees with a security clearance and will determine how that information will affect the employee's security clearance.[13] The employing agency will need to assess the impact of a change to, or loss of, security clearance on the employee's ability to carry out their duties.
- Has the employee's actions brought the employee's agency or the APS into disrepute?
    - Criminal acts may have different impacts in different agencies depending on the nature of the acts and the role of the agency. For example, possession or trafficking of illicit drugs may be more serious, and have a stronger relationship to the workplace and its reputation, where the employee is employed by a law enforcement or health regulatory agency.

Privacy and handling of sensitive information relating to criminal convictions

[13] See *Maintaining Your Clearance* on the AGSVA website at www.defence.gov.au/agsva

3.7.15 Agencies have responsibilities under the *Privacy Act 1988* (Privacy Act) in respect of employees' personal information, including information about criminal records. Under the Privacy Act, a person's criminal record is treated as 'sensitive information' and attracts additional protections.[14] The Australian Human Rights Commission has also published guidelines[15] for the prevention of discrimination in employment on the basis of a criminal record and provides information on spent conviction laws.

3.7.16 Agencies are advised to refer to guidance material produced by the Office of the Australian Information Commissioner and the Australian Human Rights Commission when dealing with information relating to criminal convictions. See also Part I, Section 2.3 *Managing misconduct action consistent with privacy requirements* of this guide.

3.8 The process for handling suspected misconduct

3.8.1 The process for handling suspected misconduct may be divided into six stages:

- identifying behaviour that may amount to suspected misconduct, including receiving allegations of misconduct
- deciding how to handle the suspected misconduct, including considering alternative administrative or performance management action
- considering whether it is necessary to suspend the employee and any review of that decision
- deciding to start misconduct action under the agency's s15(3) procedures and to undertake an investigation
- making a determination whether the misconduct has occurred
- imposing an appropriate sanction (if any).

3.8.2 Within these six stages there are important decisions to be made, including:

- Should action be taken under the agency's s15(3) procedures or not?
- Are the alleged behaviours sufficiently serious to warrant consideration of suspension from duty?
- Who should be selected to investigate and determine whether or not there has been a breach of the Code?

[14] See information provided by the Office of the Australian Information Commissioner at www.oaic.gov.au/privacy/privacy-act/criminal-records for further information.
[15] Guidelines are available at www.humanrights.gov.au/publications/human-rights-record

- How and when to provide the person under investigation with an opportunity to respond to the allegations and evidence gathered during the investigation?
- Does the information gathered during the investigation and determination process indicate that there has been a breach of the Code?
- Should a sanction be imposed and, if so, what should that sanction be?

3.8.3 This process is summarised in the flowchart in Figure 1. Guidance on appropriate actions at the different stages and how to approach the key decisions is contained in Part II, Sections 4–7 of this guide.

3.9 Roles and responsibilities in handling suspected misconduct

3.9.1 The breach decision-maker must be selected in line with the agency's s15(3) procedures and the sanction decision-maker must hold the appropriate delegations to impose a sanction.

3.9.2 Subject to their procedures, agencies have flexibility to decide the extent of the breach decision-maker's role in the misconduct action. Agencies may:

- engage an investigator to assist the breach decision-maker. The investigator may or may not make recommendations to the breach decision-maker. Where the breach decision-maker is also the sanction decision-maker, the investigator could make recommendations with respect to sanction.
- appoint a breach decision-maker who conducts the investigation and determines whether a breach of the Code has occurred and makes recommendations to a separate sanction decision-maker. In certain circumstances the Merit Protection Commissioner may be appointed in this role on a fee for service basis (s50A of the PS Act)
- appoint a breach decision-maker who conducts the investigation and determines whether a breach of the Code has occurred and is also the sanction decision-maker.

3.9.3 A person external to the agency may be appointed in each of the examples above. An externally appointed breach decision-maker needs to be authorised in accordance with the agency's s15(3) procedures. Where a sanction decision is delegated to someone outside the APS approval must be sought in writing from the Australian Public Service Commissioner in accordance with s78(8) of the PS Act. Appendix 6 *Australian Public Service Code of Conduct: Tips and traps in selecting external investigators* contains information on engaging contractors to undertake misconduct action.

3.9.4 Whatever approach is adopted, respective roles and responsibilities need to be clear and quality control mechanisms established. Further guidance on quality assurance is available in Part II, Section 10 of this guide.

Separate decision-makers for suspension, breach and sanction

3.9.5 Agencies need to consider whether it is appropriate for the same person to be appointed as both breach decision-maker and the sanction decision-maker. Subject to the agency's s15(3) procedures, it is possible for one person to have both roles. However, appointing separate decision-makers can avoid a perception of bias. For the same reason, if a suspension is to be considered, it is desirable that a separate person with delegation under regulation 3.10 make the suspension decision.

3.9.6 Agencies must ensure that the person, or persons, taking the decisions to suspend an employee, determine whether a breach of the Code has occurred and impose a sanction have the appropriate authority to make those decisions and that they are, and are perceived as, independent and free of bias.

3.9.7 It would be prudent to advise the employee, or former employee, at the start of the investigation, of the identities of the person or people involved in investigating the allegations, making the breach determination and the sanction decision. This allows the employee or former employee to raise any concerns about apprehension of bias.

3.10 Key points for agency guidance material

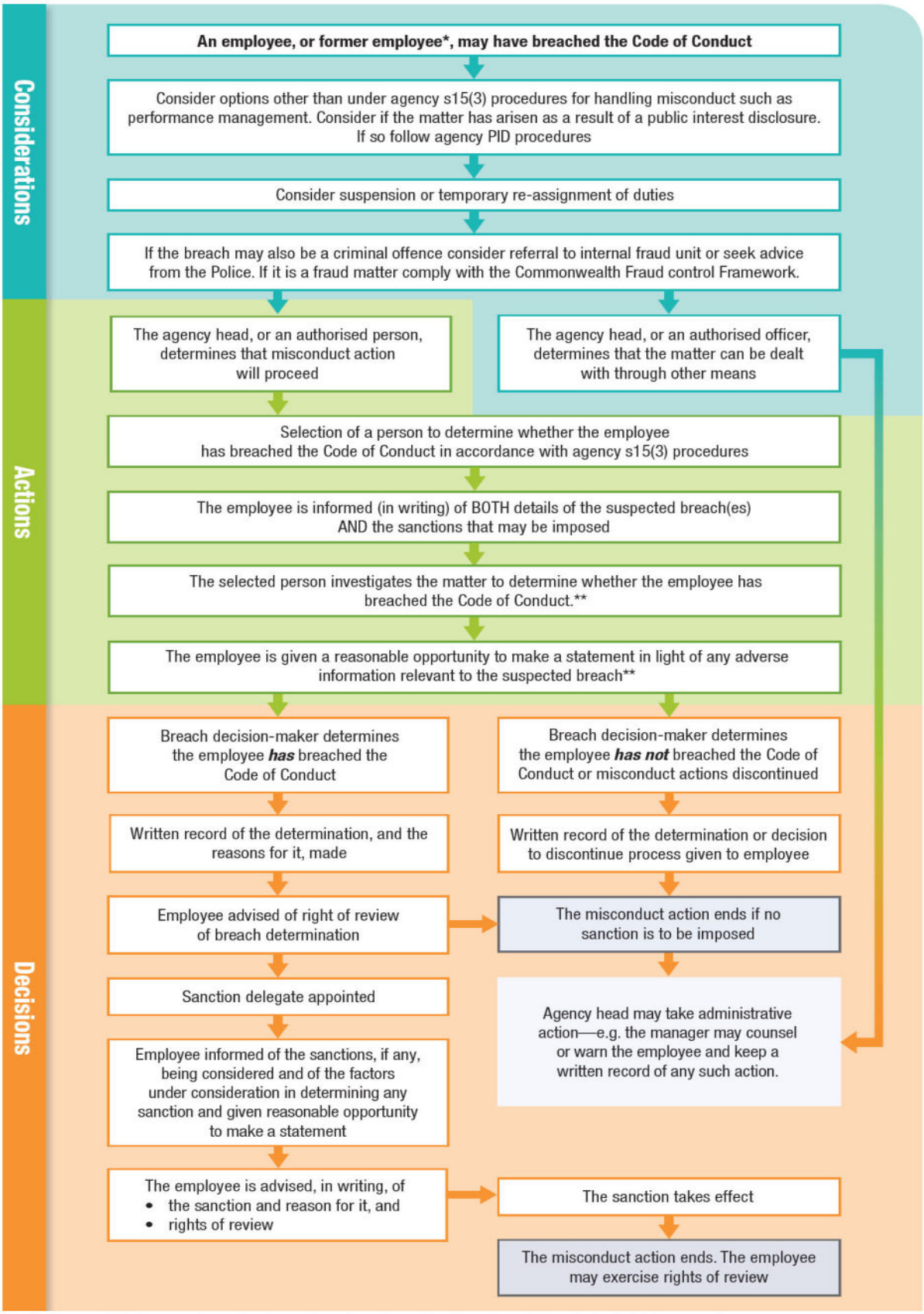
3.10.1 Agency guidance material could include information drawn from this section on the following:

- an employee's obligation to uphold the APS Values, Employment Principles and the Code
- avenues for reporting suspected misconduct
- the definition and reach of misconduct, illustrated by agency-specific examples, within and outside of the workplace
- the application of the Code to former, as well as existing, employees
- the application of the Code to employees in relation to their behaviour during the process leading to their engagement
- the relationship between any agency-based codes or behavioural expectations and the Code
- processes for reporting suspected breaches of the criminal law and the circumstances where behaviour that is a criminal offence might also breach the Code
- the relationship between the PID Act and the Code
- the relationship between the PGPA Act and the Code

- links to agency material/training on the Code available to employees and links to relevant APS Commission material if relevant e.g. *APS Values and Code of Conduct in practice*.[16]

[16] http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct

Main steps in handling suspected misconduct


Considerations
Actions
Decisions
An employee, or former employee*, may have breached the Code of Conduct
Consider options other than under agency s15(3) procedures for handling misconduct such as performance management. Consider if the matter has arisen as a result of a public interest disclosure. If so follow agency PID procedures
Consider suspension or temporary re-assignment of duties
If the breach may also be a criminal offence consider referral to internal fraud unit or seek advice from the Police. If it is a fraud matter comply with the Commonwealth Fraud control Framework.
The agency head, or an authorised person, determines that misconduct action will proceed
The agency head, or an authorised officer, determines that the matter can be dealt with through other means
Selection of a person to determine whether the employee has breached the Code of Conduct in accordance with agency s15(3) procedures
The employee is informed (in writing) of BOTH details of the suspected breach(es) AND the sanctions that may be imposed
The selected person investigates the matter to determine whether the employee has breached the Code of Conduct.**
The employee is given a reasonable opportunity to make a statement in light of any adverse information relevant to the suspected breach**
Breach decision-maker determines the employee has breached the Code of Conduct
Breach decision-maker determines the employee has not breached the Code of Conduct or misconduct actions discontinued
Written record of the determination, and the reasons for it, made
Written record of the determination or decision to discontinue process given to employee
Employee advised of right of review of breach determination
The misconduct action ends if no sanction is to be imposed
Sanction delegate appointed
Agency head may take administrative action—e.g. the manager may counsel or warn the employee and keep a written record of any such action.
Employee informed of the sanctions, if any, being considered and of the factors under consideration in determining any sanction and given reasonable opportunity to make a statement
The employee is advised, in writing, of
• the sanction and reason for it, and
• rights of review
The sanction takes effect
The misconduct action ends. The employee may exercise rights of review

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*For the purposes of this diagram, subsequent references to employees in consideration and breach determination include former employees. Sanctions cannot be imposed in relation to former employees.

**There are ongoing procedural fairness obligations in the misconduct process. See Part II of the guide for further information.

Part II: Steps and processes involved in reporting and managing suspected misconduct

4. Reporting suspected misconduct

4.1 Obligation to report misconduct

4.1.1 APS employees have a responsibility to report misconduct, and not to turn a blind eye to unacceptable behaviour. How they should report misconduct will depend on the circumstances. More serious misconduct should normally be reported and dealt with in a more serious and more formal way. In some cases, especially those involving relatively minor matters, it may be most appropriate to raise the matter directly with the employee concerned in the first instance. This will be a matter of judgement. If in doubt employees should discuss the matter with their manager or someone in authority in their agency.

4.1.2 The APS Values, APS Employment Principles, and the APS Code of Conduct (the Code), in the *Public Service Act 1999* (PS Act), set out standards and behaviours that are required of APS employees and agency heads. The APS Values require all APS employees to demonstrate leadership, be trustworthy and act with integrity (APS Values 10(2)). The Code requires APS employees, at all times, to behave in a way that upholds the integrity and good reputation of the employee's agency and the APS, as well as to comply with any lawful and reasonable direction given by their agency.

4.1.3 The *Australian Public Service Commissioner's Directions 2016* (Directions) require all APS employees, having regard to their duties and responsibilities, to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way. Failure to report suspected misconduct may itself warrant consideration as a potential breach of the Code.

4.1.4 Employees may also have reporting obligations under their agency's fraud control guidelines and other agency instructions. An agency's arrangements under the *Work Health and Safety Act 2011* may require employees to report safety issues or hazards including workplace bullying.

4.2 Options for reporting misconduct

4.2.1 Agencies are encouraged to be proactive in providing mechanisms for both the public and employees to report suspected misconduct and promote any arrangements that are in place. Having effective processes in place for reporting of suspected misconduct contributes to the integrity of the APS.

4.2.2 Agencies may have more than one way for their employees to report suspected misconduct because of the complexity of their operations or to manage particular types of suspected misconduct. Employees may be more comfortable reporting concerns if they can

do so relatively informally and have the option of discussing their concerns with the person to whom they are reporting.

4.2.3 Options for reporting suspected misconduct can include reporting to

- line managers[17]
- central conduct or ethics units
- nominated people in human resource areas including employee advice or counselling units or hotlines, fraud prevention and control units and hotlines
- email reporting addresses
- 'authorised officers' who receive public interest disclosures.[18]

4.2.4 If agencies make use of several avenues for reporting suspected misconduct, it is important that a central record is kept. This allows monitoring of trends and easy provision of consolidated data for the Australian Public Service Commission's annual State of the Service Report. Under s44(3) of the PS Act agencies must give the Australian Public Service Commissioner (the Commissioner) whatever information the Commissioner requires for the purposes of preparing the annual State of the Service Report. To date the Commissioner has routinely requested information about the number and nature of misconduct investigations. Further information about record keeping is available in Part III, Section 8 *Record keeping and access to records* of this guide.

4.2.5 Managers have an important role in encouraging and supporting staff who are considering reporting suspected misconduct. Research has indicated that it is managers' behaviour in the workplace and the culture they promote, as much as legislative and organisational systems, which determine whether conscientious staff speak-up.[19] It is good practice for agencies to undertake periodic training and awareness raising activities so that employees and managers understand their responsibilities, and the relevant agency processes, in reporting and dealing with misconduct.

4.2.6 Some allegations of misconduct may be misconceived and without substance or may have been made vexatiously. Where an agency has concerns about the way, and circumstances, in which a particular employee has reported misconduct, it may be appropriate

[17] The reporting of suspected misconduct to a supervisor may also amount to a public interest disclosure within the meaning of the *Public Interest Disclosure Act 2013*.
[18] Section 36 of the *Public Interest Disclosure Act 2013* requires agency heads to appoint authorised officers and s60A of that Act describes the additional obligations of supervisors to provide information to authorised officers.
[19] Crime and Misconduct Commission (2004) *Speaking Up—Creating Positive Reporting Climates in the Queensland Public Sector,* Building Capacity Series, No. 6 page 2.

to advise the employee that making a frivolous or vexatious report of misconduct may in itself represent a breach of the Code.[20]

Agency responsibilities under the *Public Interest Disclosure Act 2013*

4.2.1 Agency heads have responsibilities under the PID Act to develop policies and procedures for dealing with public interest disclosures. Such disclosures may include allegations of misconduct of employees. Further information on the PID scheme can be found at the Commonwealth Ombudsman's website at www.ombudsman.gov.au/pages/pid/ and at Appendix 3 *Interaction between the Australian Public Service Code of Conduct and the Public Interest Disclosure Act*.

4.3 Protections for employees reporting or witnessing misconduct

Anonymity, confidentiality and protection from retribution

4.3.1 Some employees may be concerned that they will be victimised, or discriminated against, for reporting suspected misconduct. For this reason, they may make reports anonymously or request that their identity is kept confidential.

4.3.2 Agency guidance material should advise employees that they may make reports anonymously but also provide assurance that employees who report in good faith will be protected from victimisation and discrimination.

4.3.3 Extra care needs to be taken when managing concerns about the identity of the person reporting misconduct when a misconduct investigation arises from a public interest disclosure made under the PID Act. The PID Act makes it an offence to disclose the identity of the discloser, unless the information is used for the purposes of the PID Act or taking action in response to a disclosure investigation. Further information about the handling of misconduct arising from a disclosure under the PID Act is available in Appendix 3 to this guide.

4.3.4 Employees who report suspected misconduct outside the PID Act are legally protected from discrimination or victimisation. Retaliatory action taken against someone who in good faith has reported suspected misconduct could be a potential breach of a number of elements of the Code, including the requirements to:

- behave with integrity in connection with employment
- comply with all applicable Australian laws
- treat everyone with respect, courtesy and without harassment.

4.3.5 In general, these protections also extend to witnesses in misconduct cases.

[20] Special circumstances and protections for the employee may nonetheless apply if the employee has made those allegations under the *Public Interest Disclosure Act 2013*.

4.3.6 It is often necessary to reveal the identity of the complainant or a witness in order to provide the person under investigation with the information they need to respond fully to the allegations. Even if the agency considers that it is not necessary to reveal identities of complainants and witnesses during the course of its own investigation, the identities may be revealed on review by the Merit Protection Commissioner, the Fair Work Commission, in related criminal proceedings, or in the context of a legal challenge to the decision.

4.3.7 Accordingly, it is advisable for agencies to notify employees who report suspected misconduct, or provide witness statements, that the agency will seek to keep their identity confidential as far as possible but cannot give any guarantee of confidentiality.

4.3.8 In the majority of cases, complainants and witnesses do not face a serious risk of harm from reporting misconduct. Nonetheless, employees and witnesses may feel more confident about providing evidence in misconduct processes if they are assured that an assessment has been undertaken of the risk of retaliatory action, or other adverse outcomes, and that the agency has taken steps to put mitigation strategies into place. Agencies are advised to consider the risks in each case and develop strategies to remove or mitigate those risks, as appropriate.

4.3.9 Mitigation strategies need to be proportionate to the level of risk identified, and may include, but are not limited to:

- directing employees who are suspected of misconduct with respect to their behaviour towards the complainant and witnesses, including not entering into discussions about the incident/s with the complainant or other witnesses
- arranging for the employee suspected of misconduct to be temporarily assigned duties in another location while ensuring that there is no presumption of prejudging the matter
- assigning the reporting employee or witness other appropriate duties in another location
- developing and implementing a specially tailored protection plan in circumstances where there is a real risk to the physical security of employees, their families or property
- taking steps to ensure the fairness of employment decision-making affecting the complainant or witnesses, such as appointing an independent member to the selection committee for any selection exercise in which they are a candidate.

Retaining evidence

4.3.10 Agencies may wish to advise employees who believe they have witnessed misconduct to:

- make notes about what they have seen or heard
- keep any relevant documents and not make any written annotations on them

- report the matter through the appropriate channels but otherwise keep it confidential.

4.4 Key points for agency guidance material

4.4.1 Agency guidance material could include information drawn from this section on

- encouraging employees to report suspected misconduct as part of their duty as an APS employee
- the different options available to employees to report misconduct including agency PID procedures
- confidentiality and protection from retribution, including the circumstances where confidentiality may limit agency action, advice relating to risk assessment and mitigation strategies that may be available and protection of disclosers required under the PID Act
- managing the expectations of the parties involved, including the employee making a report of misconduct and witnesses, about privacy issues in particular the use and disclosure of their personal information
- the obligations of managers to ensure that employees who report suspected misconduct are treated appropriately following making their report
- retaining and make records of evidence.

5. Considering a report of suspected misconduct

5.1 Relationship between misconduct and performance management processes

5.1.1 Employee behaviour considered inconsistent with the Australian Public Service (APS) Code of Conduct (the Code) can vary from serious matters, for example, large scale fraud, theft, misusing clients' personal information, sexual harassment and leaking classified information to relatively minor matters, such as a single, uncharacteristic angry outburst.

5.1.2 Not all suspected misconduct needs to be dealt with under an agency's s15(3) procedures. Other approaches such as performance management, counselling, or alternative dispute resolution, such as mediation, may be the most effective way to address behaviour that is minor misconduct.

5.1.3 When considering concerns about an employee's behaviour that relate both to the employee's effective performance and to suspected breaches of the Code, section 40 of the *Australian Public Service Commissioner's Directions 2016* (the Directions) requires agency heads to have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner (the Commissioner) before initiating an investigation under the agency's s15(3) procedures.

5.1.4 The material at paragraphs 5.1.5 to 5.1.9 below provides the standards and guidance referred to in section 40 of the Directions.

5.1.5 The purpose of the Code is to set out the minimum behavioural standards required of APS employees. Taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the agency and the APS and thereby maintaining public confidence in public administration. Rather than seeking to punish the employee, an aim of misconduct action is to maintain proper standards of conduct by APS employees and protect the reputation of the APS.

5.1.6 Performance management arrangements also provide an appropriate mechanism for dealing with some forms of unacceptable workplace behaviour. Good management practice would be to consider whether the suspected misconduct could be better dealt with under the agency's performance management framework before deciding whether to start a misconduct investigation.

5.1.7 Misconduct action is not a substitute for managing challenging behaviours that are more appropriately managed as unsatisfactory performance. Taking misconduct action for relatively minor matters can have the effect of undermining the integrity of the conduct framework.

5.1.8. The decision about which approach to use needs to be considered carefully on the facts of each case having regard to the following:

1. *How serious is the suspected behaviour? What is the potential impact on public confidence in the integrity of the agency and the APS?*

   As a general rule, the more serious the alleged behaviour or the greater the potential impact on public confidence in the integrity of the agency and the APS, the more appropriate it is to use misconduct processes.

2. *How likely is it that the employee would respond constructively to action under an agency's performance management framework?*

   Where an employee has shown, through their behaviour, that they are unlikely to respond constructively to action under the performance management framework, misconduct action may be the most effective way of dealing with the matter.

3. *To what extent is the suspected behaviour within the control of the employee?*

   Unacceptable behaviour by an employee that is within their control, for example wilful refusal to follow lawful and reasonable directions, or a blatant disregard for expected behavioural standards could generally be dealt with as a potential breach of the Code. Behaviour that is either accidental or is a result of a lack of capability on the employee's part is often better dealt with through other processes.

5.1.9 In all cases it is important that an apparent breach of the Code be addressed in some way and a record made of any action taken and the reasons for it. Minor unacceptable behaviour, if unaddressed, may be repeated or may escalate to more serious behaviour.

5.1.10 At Appendix 7 is a checklist on *Initial consideration of suspected misconduct* to assist agencies.

5.2 Suspected misconduct and underlying medical conditions

5.2.1 All employees are required to comply with the Code regardless of mental or physical incapacity. The ability to comply with the Code is an inherent requirement for employment in the APS.

5.2.2 In some cases unacceptable behaviour may appear to be the result of an underlying medical condition. In such cases, agencies are advised to consider seeking medical opinion to establish whether there is a causal link between the behaviour and the employee's health.[21]

[21] Also see the APSC publication *Working Together: Promoting mental health and wellbeing at work* at www.apsc.gov.au/publications-and-media/current-publications/mental-health.

5.2.3 While mental illness or physical incapacity does not usually determine whether or not behaviour would be investigated as suspected misconduct, it may be a mitigating factor in deciding the severity of any sanction imposed for a breach of the Code.

5.3 Suspected misconduct of former APS employees

5.3.1 In July 2013 the *Public Service Act 1999* (PS Act) was amended to make specific provision for agencies to continue, or initiate, inquiries into suspected misconduct by former APS employees.[22] It is only possible to initiate misconduct action against a former employee who left the APS on or after 1 July 2013.[23]

5.3.2 In deciding whether to start an investigation once an employee has left the APS, or to continue an investigation once an employee resigns, the following matters could be considered.

- Whether it would be possible to give the former employee a fair hearing, including a reasonable opportunity to answer the case against them.
    - Factors to consider include the passage of time since the incident(s) and any constraints on the former employee accessing records in order to be able to respond effectively to the allegations.
    - Agencies may need to consider whether to provide a former employee with supervised access to agency premises or resources in order to identify relevant records.
- The risks of not undertaking an investigation, such as damage to the reputation of the agency or APS, or the message not pursuing the matter would send to other employees or the community about the seriousness with which the agency responds to integrity concerns
- The costs associated with any investigation
- The availability of, and ability to collect, evidence.

5.3.3 A former employee is not obliged to cooperate with an investigation and an agency head has no power to direct the former employee to provide information or attend interviews. Where attempts to contact a former employee by telephone, email or by registered mail have failed, an agency may be satisfied that reasonable attempts have been made to inform the former employee of the allegations and continue the investigation.

[22] This provision does not apply to APS employees who left that agency to go to another APS agency on transfer or promotion.
[23] In accordance with the transitional provisions in the *Public Service Amendment Act 2013,* Schedule 4, Part 6, Item 20

5.3.4 A former employee may be motivated to cooperate in an investigation because of the impact an adverse outcome could have on their reputation or employability.

5.3.5 Former employees found to have breached the Code have the right to seek review by the Merit Protection Commissioner of that determination. [24]

5.3.6 While a breach decision-maker may make a determination that a former employee has breached the Code, the agency head has no power to impose a sanction on the former employee.

5.3.7 Some employees subject to allegations of a breach of the Code separate from the APS before their agency has completed a Code investigation. If the agency does not proceed to determine whether a breach of the Code has occurred, it is open to those employees to claim subsequently, if asked by a new employer, that they have not been the subject of a determination. They cannot claim, however, not to have been the subject of allegations that they had breached the Code and an investigation. While minor breaches of the Code may not be of consequence for future employment, serious misconduct may be a matter for consideration in pre-employment checks by the new employer. For further information on privacy matters and the information one APS agency may disclose to another agency see Part II, Sections 2.3 and Part III, Section 8 of this guide.

5.4 Public Interest Disclosures and misconduct investigations

5.4.1 Suspected misconduct could be identified through a disclosure made in accordance with the *Public Interest Disclosure Act 2013* (PID Act) either directly to an authorised officer or through a supervisor or manager. Further advice on the PID Act can be found at www.ombudsman.gov.au/pages/pid/. Appendix 3 *Interaction between the Australian Public Service Code of Conduct and the Public Interest Disclosure Act* provides some advice on the management of disclosures that may also be a suspected breach of the Code.

5.4.2 Each agency must treat disclosures made under the PID Act in accordance with the provisions of that Act.

5.5 Consistency of approach to handling suspected misconduct

5.5.1 Consistent messages about the agency's views on various types of misconduct assists employees to understand the behaviour that is expected of them. APS agencies will take different approaches to some types of misconduct because of the different risks posed by each agency’s operating environment. However, differential treatment of employees for similar misconduct within an agency has been considered to indicate unfairness in the context of

[24] Review rights and procedures for former employees in this regard are set out in Division 7.3 of the Public Service Regulations.

unfair dismissal claims in the Fair Work Commission. The Merit Protection Commissioner may also take this into consideration when reviewing agency decisions on sanction.

5.5.2 Inconsistent approaches may arise within an agency if managers are unaware of the agency's views on the seriousness of certain types of misconduct. One of the most effective ways of helping managers to make consistent and appropriate decisions is to provide guidance, illustrated with practical examples, about the factors to take into account when deciding whether to deal with the suspected misconduct through the agency's s15(3) procedures or through alternative methods.

5.5.3 Inconsistencies may also arise where there is devolved decision-making and a large number of people holding authorisations and delegations. Consistency in decision is likely to be assisted by ensuring that managers with the appropriate level of seniority are authorised to make decisions about certain types of misconduct.

5.6 Misconduct action—preliminary investigations

5.6.1 A preliminary investigation may indicate that, although there may be some substance to an allegation, it is not a matter best dealt with under an agency's s15(3) procedures. This could occur if the alleged behaviour is better addressed through the performance management framework.

5.6.2 Preliminary investigations may also indicate there would be little utility in proceeding to a s15(3) investigation. This can occur for a range of reasons including insufficient evidence to be able to reach a concluded view that misconduct had occurred.

5.6.3 The timing of an investigation is another factor to consider. For example where a matter is also under investigation as a possible criminal offence, moving to a s15(3) investigation too early can alert the person suspected of misconduct, prejudicing the capacity of the criminal investigation to gather evidence. To minimise the prospect of the destruction or removal of evidence, some agencies complete information gathering, as far as reasonably practicable, before the person suspected of misconduct is advised that they may be under any suspicion. For further information see Part I, Section 3.7 *Suspected misconduct that may also be a criminal act.*

5.6.4 While as a matter of good practice, agencies should aim to keep the preliminary investigative phase short, this is not always possible. Some agencies prefer to gather a large amount of evidence before invoking their s15(3) procedures. In these cases, the agency may advise the person suspected of misconduct during the preliminary phase that a matter concerning their conduct has arisen, and is being examined, and that they will be given an opportunity to respond at a later date.

5.6.5 Generally, agencies prefer to advise an employee suspected of misconduct earlier, rather than later, to avoid the undesirable situation of the employee discovering unofficially that an investigation is underway.

5.6.6 In serious cases where any delay in acting on suspected misconduct raises a real risk to the safety of employees or clients, or that evidence may be destroyed, it is advisable to start an investigation, in accordance with the agency's s15(3) procedures, as quickly as possible. Prompt consideration may need to be given to suspending the employee from duty or assigning them to other duties—see Part II, Section 5.8 *Deciding whether to reassign duties or suspend the employee* of this guide.

5.7 Alternatives for addressing behavioural concerns

5.7.1 Options available to agencies if it is decided to address allegations about behaviour through means other than misconduct action include:

- through the performance management framework, for example, by clarifying performance expectations regarding behaviour in performance plans
- by providing training or coaching for the employee
- by monitoring and guiding the employee about appropriate behaviour, for example, as part of performance management discussions
- by counselling, particularly where the concern relates to a single incident
- by assigning new duties. Care needs to be taken to ensure that this is not perceived as a de facto sanction imposed without a proper process
- by determining if there are health issues that may be impacting on the employee's performance and putting in place appropriate management actions as a consequence[25]
- by using alternative dispute resolution such as mediation, conciliation or group conferencing to assist in resolving interpersonal disputes.[26]

Records of employee discussions

5.7.2 Where an alternative to misconduct action is taken a record should be made of key discussions and outcomes. This is particularly important where an employee is counselled that particular conduct is unacceptable and remedial action undertaken. It is good practice to share that record with the employee and to record any comments made by the employee. These records, and records of any follow-up discussions or counselling, should be filed in accordance with agency policy.

[25] For further information see the APSC publications *Working Together: Promoting mental health and wellbeing at work* at www.apsc.gov.au/publications-and-media/current-publications/mental-health and *Information about disability for managers and human resources professionals* at http://www.apsc.gov.au/managing-in-the-aps/disability

[26] See Department of the Attorney-General's *Your Guide to Dispute Resolution* www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx

5.7.3 Employees should also be informed that records of counselling may be relied on in handling future allegations of misconduct. It may be appropriate to inform the employee of the agency's policy relating to the retention and destruction of such records. See also Part III, Section 8 *Recordkeeping and access to records* of this guide.

Where conduct does not improve or deteriorates

5.7.4 Alternative measures may not satisfactorily resolve concerns about an employee's conduct and the employee may repeat behaviours of concern. It may be necessary to take misconduct action under the agency's s15(3) procedures on the basis that a pattern of suspected misconduct may be developing. This may be the case even though the initial incident was relatively minor.

5.8 Deciding whether to reassign duties or suspend the employee

5.8.1 Action to reassign duties temporarily, or to suspend from duty, may be made at the same time as the decision to start action under an agency's s15(3) procedures, or at any stage during the process of determining whether a breach of the Code has occurred. It may be necessary to reassign an employee's duties, or to suspend the employee, during a misconduct investigation as a result of a further development e.g. concerns of other staff, repetition of the behaviour, or new allegations come to light during the investigation.

5.8.2 In exercising these powers, the decision-maker should not prejudge, or be seen to prejudge, the outcome of the misconduct action. Although an employee may be reassigned duties before a determination that a breach of the Code is made, it will be for operational reasons and is not to be used as a punitive measure or a sanction. At this stage re-assignment of duties and suspension are precautionary measures aimed at protecting the interests of the agency and its reputation, the public interest and/or the interests of other employees, including the complainant or witnesses. In some cases, these decisions will also be made in the interests of the employee under investigation.

5.8.3 Agencies should be clear about who has the authority to take decisions regarding the re-assignment of duties or suspension from duty. It is preferable for this person not to have been involved in investigating the alleged breach of the Code or making a related determination. The person making the suspension or re-assignment decision must be given delegated authority to do so under the PS Act and *Public Service Regulations 1999* (PS Regulations). A checklist designed to assist suspension decision-makers is at Appendix 8 of this guide.

Re-assignment of duties

5.8.4 The agency may decide that it is more appropriate to assign new duties to the employee for a temporary period as an alternative to suspension.[27] The power to do so is the general assignment of duties power in s25 of the PS Act.

5.8.5 The factors to take into account are similar to those applying to the decision to suspend the employee—that is, the public interest and the agency's interests. The maintenance of a cohesive and effective workplace is a relevant consideration in relation to the re-assignment of duties. It may also be appropriate to have regard to the circumstances of the employee under investigation and in some cases the circumstances of their family e.g. would relocation to another region be appropriate.

5.8.6 In order to ensure that all relevant facts are considered before making a decision on re-assignment of duties, it is appropriate to notify the employee of the proposal and seek their views. Sometimes urgent action may be required that will not allow for that opportunity. In this case it would be appropriate to invite the employee to comment on the re-assignment after the decision has been made. Depending on the employee's response, the agency has the flexibility to consider alternative arrangements, including suspension from duty.

5.8.7 Employees who are assigned to different duties are not entitled to seek review of the re-assignment decision under s33 of the PS Act, unless the re-assignment involves relocation to another place or being assigned duties that the employee cannot reasonably be expected to perform.[28]

Legislative framework for suspension

5.8.8 Section 28 of the PS Act, and regulation 3.10 of the PS Regulations, set out the legislative basis for suspending an employee who is suspected of having breached the Code. In brief, the provisions are as follows.

- An employee may be suspended, with or without remuneration, where the agency head believes, on reasonable grounds, that the employee has, or may have, breached the Code and where the suspension is in the public interest, or the agency's interest (regulation 3.10(1), (2), and (3)).
- If the suspension is to be without remuneration, the period without remuneration is to be:

[27] Agencies may wish to refer to *Department of Employment and Workplace Relations v Oakley*, PR954267 and PR954267. This AIRC decision is significant in that the Full Bench held that it was appropriate and reasonable to delay taking Code action so as not to prejudice criminal proceedings about the same matter, and that the decision to place the employee on alternative, restricted duties was appropriate and, in that case, preferable to suspension from duty. The AIRC held that in that case it did not mean that a sanction of termination of employment was unfair.

[28] For further information on review arrangements see www.apsc.gov.au/merit

a) not more than 30 days; or

b) if exceptional circumstances apply—a longer period (regulation 3.10(3)).

- A suspension, with or without pay, must be reviewed at reasonable intervals (regulation 3.10(4)).
    - A review of suspension under regulation 3.10 is not a review of the original suspension decision. It is a fresh decision as to whether the employee should be suspended.
- Suspension must end immediately if the agency head no longer believes, on reasonable grounds, that

    a) the employee has, or may have, breached the Code, or

    b) that it is in the public interest, or the agency's interest, to continue the suspension (regulation 3.10(5)).
- Suspension must end as soon as any sanction is imposed for the relevant breach of the Code (regulation 3.10(6)).
- In exercising suspension powers, the agency head must have due regard to procedural fairness unless, on reasonable grounds, they believe that it would not be appropriate to do so in the particular circumstances (regulation 3.10(7)).

5.8.9 The requirements in the regulations concerning review and revocation of suspension decisions mean that the suspension decision-maker must be informed of progress with the misconduct investigation. They need this information to ensure that they can properly review, at reasonable intervals, the decision to suspend the employee, or to revoke the suspension in the circumstances provided for in regulation 3.10(5) and 3.10(6).

When is it appropriate to suspend an APS employee?

5.8.10 The starting point for considering whether to suspend an employee suspected of breaching the Code is the public interest or the agency's interest. It may be in the public, and agency's interest, to suspend an employee from duty where their continued presence in the workplace poses risks to, for example:

- the safety and well-being of members of the public, including agency clients
- the integrity of data about members of the public held by the agency
- the public revenue
- public confidence in the agency or the APS as a whole.

5.8.11 In addition, it may be necessary to suspend an employee from duty where:

- there is a significant risk that an investigation of the allegation may be compromised by the employee's presence in the workplace

- the alleged misconduct is serious and there is a real risk that the conduct may be repeated
- the allegations may have impaired the public's confidence in the agency's capacity to perform its functions
- there is a risk to the safety of other employees
- it would be inappropriate for the employee to continue to perform their usual duties until the allegations are resolved, and assignment of other duties is not appropriate or cannot be accommodated.

Procedural fairness in relation to suspension

5.8.12 As set out above, regulation 3.10(7) requires a decision-maker when making a decision to suspend an employee, to have due regard to procedural fairness unless, on reasonable grounds, the decision-maker believes that it would not be appropriate to do so in the particular circumstances. Cases where the decision-maker decides not to have regard to procedural fairness are likely to be unusual. It may be appropriate where there is a need to act urgently due to safety concerns, or a risk that evidence will be destroyed, or where there is some other overriding public interest.

5.8.13 In most cases, however, decision-makers will be able to have due regard to procedural fairness. The usual practice is to:

- inform the employee suspected of misconduct, in writing, of the agency's preliminary intention to suspend and the reasons for this proposal, and
- give the employee a reasonable opportunity to respond before any decision to suspend is taken.

5.8.14 An employee who is suspended without first being given an opportunity to comment should be advised of the reasons for the suspension decision, and for proceeding without seeking the employee’s comments, and invited to comment.

5.8.15 Upon receipt of the employee’s comments, a review of the decision to suspend can promptly occur.

5.8.16 Advice to an employee about a suspension decision needs to be clear that the decision is not a prejudgement of whether the employee has breached the Code.

Suspension with or without remuneration

5.8.17 The suspension decision-maker is required to decide whether suspension from duties is with or without remuneration.

5.8.18 The term remuneration is not defined by the PS Act or PS Regulations but, in accordance with its ordinary meaning, includes:

- annual salary, excluding performance-based allowances, that would have been paid to the employee for the period they would otherwise have been on duty, including any approved higher duties allowances
- other salary-related payments, including those associated with the performance of extra duties, such as overtime but excluding overtime meal allowance, and shift penalty payments where there is a longstanding and regular pattern of extra duty or shift work being performed which would have been expected to continue but for the suspension from duty
- any other allowances of a regular or ongoing nature e.g. including cost reimbursement allowances such as a temporary accommodation allowance.

5.8.19 Factors to consider in making the suspension decision may include:

- the seriousness of the suspected misconduct—suspension without remuneration would usually be appropriate in cases where the sanction imposed might be termination of employment if the suspected misconduct is determined to be a breach of the Code
- obligations under s15 of the *Public Governance, Performance and Accountability Act 2013* with respect to the proper use and management of public resources. In the circumstances of the case, is it appropriate for the suspended employee to be remunerated if they are not working?
- whether suspension without remuneration would give the employee an added incentive to cooperate with the investigation
- the estimated duration of the misconduct action
- the likely financial hardship, if any, for the employee.

5.8.20 Under both the common law and the *Administrative Decisions (Judicial Review) Act 1977,* a decision-maker is required to take into account all relevant considerations and should not rely on irrelevant considerations in reaching a decision. A claim of financial hardship in the context of a 'suspension without remuneration' decision is a relevant consideration and needs to be considered by the decision-maker. The decision-maker can balance the severity of the suspected breach against the severity of the financial impact of the suspension. In some circumstances the hardship imposed may be disproportionate to the suspected breach. On the other hand, a suspected breach may be so serious that it outweighs claims of hardship.

5.8.21 The onus is on the employee to substantiate a claim of hardship, by providing persuasive evidence in support of their case. A decision-maker might not attach much weight to an assertion of hardship. However, a decision-maker may request further information about the nature of the hardship. For example, where an employee claims that their bank would take possession of their house, the decision-maker might seek a statement to this effect from the bank and/or a signed statutory declaration from the employee. The decision-maker might then attach greater weight to that consideration in reaching the decision.

5.8.22 A period of suspension without remuneration longer than 30 days is permitted only where there are exceptional circumstances. Exceptional circumstances are not defined in the legislation,[29] but could include:

- where a strong *prima facie* case of serious misconduct is apparent
- in order to minimise any delay between a determination of breach and imposing a sanction, where a finding has been made of a serious breach of the Code
- where an employee has been charged with a criminal offence and is waiting to have the charge heard and determined
- where an employee has appealed against a criminal conviction and is waiting to have the appeal heard.

5.8.23 An employee who is not receiving remuneration may be able to access paid leave credits during suspension. This is at the discretion of the agency and dependent on the provisions of the relevant industrial instrument setting out terms and conditions of employment, and agency policies. Some agencies allow suspended employees to access accrued recreation or long service leave credits, but not personal leave. The rationale for drawing this distinction is that personal leave is generally available where an employee is prevented by illness or caring responsibilities from attending for duty. Providing personal leave for a period of suspension is usually inconsistent with the purpose of the leave.

5.8.24 An employee who is suspended may wish to seek outside employment while the suspension is in place. An agency's policies and procedures on outside employment would continue to apply, including whether any outside employment might create a possible conflict of interest with the employee's public service employment. A suspension with or without remuneration does not affect the employee's obligation to comply with agency policies, lawful and reasonable directions, or with the Code, more generally.

5.8.25 An agency may consider whether an employee who was suspended from duty and subsequently found not to have breached the Code, is able to seek compensation for any salary foregone, or leave credits taken, during the period of suspension. There is no express provision in the PS Act or Regulations allowing for salary to be paid in the event that an employee is found not to have breached the Code. However, section 73 of the PS Act provides a mechanism for the approval of payments to employees in 'special circumstances', and may provide the authority for any compensatory payment. Further information on the operation of section 73 is on the Commission's website.[30]

[29] Considering the phrase in the context of a different Act, the Full Federal Court said that 'exceptional circumstances' means 'unusual or out of the ordinary': *Oreb v Willcock* [2005] FCAFC 197.
[30] At www.apsc.gov.au/aps-employment-policy-and-advice/employment-framework/payments-in-special-circumstances-under-section-73-of-the-public-service-act-1999

Recognition of service during suspension

5.8.26 Whether the period of suspension from duty of an employee counts as 'service' for purposes such as annual leave or long service leave, is dependent on the terms of legislation and any industrial instrument or contract that confers the entitlement to leave. This is the case whether the employee is suspended with or without remuneration. For example:

- Generally, it is considered that suspension from duty does not constitute a break in an employee's continuous employment as defined in s11(1) of the *Long Service Leave (Commonwealth Employees) Act 1976*. Periods of suspension, with or without pay, would therefore not affect an employee's long service leave entitlements.
- Whether a period of suspension counts as service for annual leave purposes is dependent on the employee's conditions of employment as provided for in an industrial agreement or supporting policies. If the conditions of employment do not exclude the accrual of annual leave during periods of suspension, the period of suspension, with or without remuneration, will generally count as service for annual leave accrual purposes.

5.8.27 It is advisable for agencies to inform the employee on suspension about the agency's policies on access to the workplace, entitlement to apply for jobs in the agency and other agencies, and attendance at training courses previously booked or approved.

Right of Review

5.8.28 Agency guidance to employees needs to be clear on the distinction between the right to have suspension from duty reviewed at regular intervals (regulation 3.10(4)) and the review of actions provisions in s33 of the PS Act. Review of suspension under regulation 3.10(4) has prospective effect. It examines whether an employee's suspension from duty is to continue from the time of the review decision. It does not involve a reconsideration of the original decision to suspend the employee.

5.8.29 A review of action under s33 of the PS Act, by contrast, involves re-examination of the original decision. It is good practice to advise the employee of their right to seek a review, under s33 of the PS Act, of the decision to suspend. See also Part III, Section 9, *Review of Actions and other review options* of this guide.

5.9 Key points for agency guidance material

5.9.1 Agency guidance material could include information drawn from this section about:

- the considerations relevant to a decision to deal with suspected misconduct under the agency's s15(3) procedures or through other action and who is responsible for making this decision

- the types of suspected misconduct that the agency considers would usually be handled under the agency's s15(3) procedures
- suspected misconduct and underlying medical conditions
- suspected misconduct and former employees
- disclosures of suspected misconduct made under the PID Act (see Appendix 3 *Interaction between the Australian Public Service Code of Conduct and the Public Interest Disclosure Act*)
- the recordkeeping requirements for employee discussions/counselling sessions and what to do if the employee's conduct does not improve or deteriorates further
- procedures for managing suspension and assignment of duties, including
    - circumstances in which an employee may be suspended, with or without remuneration, or assigned other duties under s25 of the PS Act
    - responsibilities for decision-making
    - review arrangements.

6. Investigative process

6.1 Selecting a decision-maker

6.1.1 Once it has been decided to start action under the agency's s15(3) procedures, the next step is to select the decision-maker who will determine whether there has been a breach of the Code of Conduct (the Code). An agency's s15(3) procedures may identify the classification/position of persons with authority to appoint the breach decision-maker and, if so, the breach decision-maker must be selected in accordance with the procedures. It is advisable for the breach decision-maker's appointment to be in writing.

6.1.2 The breach decision-maker is preferably someone relatively senior in the agency who is familiar with the agency's business and has good judgement.

6.1.3 The breach decision-maker may conduct the investigation themselves or use an investigator. Where the breach decision-maker is expected to manage their normal workload during the investigation, it may expedite the process to appoint a separate person to conduct the investigation. An investigator must be appointed in accordance with the agency's s15(3) procedures if the procedures have provisions for appointing an investigator. Where the procedures do not have such provisions, the investigator is selected outside the procedures as a person assisting the decision-maker.

6.1.4 The role of the investigator is to gather evidence, including interviewing witnesses, and to communicate with the person under investigation and witnesses. Subject to an agency's section 15(3) procedures, the investigator may provide the decision-maker with their own opinions about the facts of the case, and prepare a report with recommendations. However, the breach decision-maker needs to form an independent view of the evidence and is responsible for both making findings of fact and any determination of breach of the Code of Conduct which flows logically from those findings.

6.1.5 The respective roles and responsibilities of the investigator, decision-maker(s), and where relevant any human resources case manager, should be made clear in agency guidance material. Appendices 8-10 of this guide on *Employee suspension checklist, Making a decision about a breach of the Australian Public Service Code of Conduct checklist*, and *Sanction decision-making checklist* may be useful when developing agency guidance. Appendix 6 of this guide on *Australian Public Service Code of Conduct: Tips and traps in selecting external investigators* is also relevant.

Independent and unbiased decision-maker

6.1.6 The person who appoints the breach decision-maker needs to take reasonable steps to ensure that the decision-maker is, and appears to be, independent and unbiased. Administrative law requires that a decision-maker be free from actual bias or any reasonable apprehension of bias. The test for reasonable apprehension of bias is whether a hypothetical fair-minded person, properly informed of relevant circumstances, might reasonably

apprehend that the decision-maker might not have brought an impartial mind to the decision.[31]

6.1.7 Examples of where bias could, or could be thought to, arise are as follows:

- The decision-maker has a personal interest in the decision including for example a personal relationship or a close working relationship with the person suspected of misconduct, a complainant or witnesses.
- The decision-maker has previously expressed a concluded view on a matter that needs to be determined.
- The decision-maker has had access to prejudicial information, not relevant to the matters to be determined, but which could reasonably be seen as influencing the decision-maker's views.
- A senior manager makes comment on the case in a manner which could be perceived to influence the more junior decision-maker.
- The decision-maker is a witness in the matter.

6.1.8 Care needs to be taken if a breach decision-maker has previously investigated the matter, or a related matter, in another capacity. Consideration should be given to the nature of the previous involvement and the matters they were asked to consider. If there is any doubt about the suitability of a decision-maker, it would be prudent to make another choice. It may be appropriate for a person from outside the agency or the APS to be selected, if it is not possible to find a decision-maker 'free from apparent bias' within the agency.

6.1.9 It is recommended that the breach decision-maker not be informed that the person suspected of misconduct has previous findings of breaches of the Code, if that is the case. This allows the breach decision-maker to decide whether or not there has been misconduct solely on the evidence relating to the matter under investigation. Prior misconduct will be relevant if there is a decision to impose a sanction. See Part II, Section 7 *The determination and sanction* of this guide.

6.2 Selecting an investigator

6.2.1 Agencies may find it useful to maintain a pool of employees who have experience or training in conducting workplace and misconduct investigations, and are familiar with administrative law principles.

6.2.2 Agencies may for a variety of reasons wish to engage an external person to conduct a misconduct investigation. Information on engaging an external investigator is in Appendix 6

[31] See the Administrative Review Council (ARC) Best-Practice Guide *Decision Making: Natural Justice* for more information on bias at www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx

Australian Public Service Code of Conduct: Tips and traps in selecting external investigators. The information in the appendix is relevant both to the engagement of contractors and the secondment of an APS employee from another agency to assist with an investigation.

Investigation skills

6.2.3 Some cases of suspected misconduct are straightforward to investigate. However investigating suspected misconduct can be difficult and requires judgement, attention to detail and investigative skills. The choice of both the breach decision-maker and any investigator are important ones. Investigators and the breach decision-makers involved in more complex cases require training and/or experience in administrative investigations and administrative decision-making, and in the misconduct decision-making process.

Ensuring the quality of the investigation

6.2.4 Where an investigator is selected to assist the breach decision-maker, it is important that the investigator understands their role and the procedures with which the investigation must comply. An investigator plays an important role in ensuring the quality of any determination decision.

6.2.5 The breach decision-maker has ultimate responsibility for ensuring that the decision-making process adheres to administrative law requirements, including procedural fairness, and the agency's procedures. It is important for the breach decision-maker to be satisfied with the approach to, and quality of, the investigation, including:

- the quality and quantity of the evidence and whether or not the evidence establishes the facts on which any finding of misconduct is based
- the way the evidence has been collected
- that the agency's s15(3) procedures have been complied with and other legal requirements met, including procedural fairness.

6.3 Investigations of suspected fraud or other criminal behaviour

6.3.1 Where the matters under investigation include suspected criminal behaviour, agencies will need to consider referral to the Australian Federal Police (AFP) or other police forces as set out in Part II, Section 3.7 *Suspected Misconduct that may also be a criminal act* of this guide.

6.3.2 In cases of suspected fraud and other criminal behaviour, the person conducting the investigation must follow the agency's fraud control policy and procedures. These policy and procedures must be consistent with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the Commonwealth's Fraud Control Framework. The Department of the Attorney-General administers the Commonwealth's Fraud Control Framework which

includes the *Commonwealth Fraud Control Policy*.[32] The *Commonwealth Fraud Control Policy* supports agencies to discharge their responsibilities under the PGPA Act and the Fraud Control Rule made under that Act. Further information about the fraud control framework, including links to the legislation, is available on the Department of the Attorney-General's website.[33]

6.3.3 Consistent with the *Commonwealth Fraud Control Policy*, agency fraud investigations must meet the requirements set out in the Australian Government Investigation Standards (AGIS) which are administered by the Australian Federal Police. This includes competency standards for persons undertaking fraud investigations.[34]

6.4 Advising that misconduct proceedings have started

6.4.1 Once the decision to start misconduct action has been taken, and the breach decision-maker has been selected, the person suspected of misconduct should be advised at the earliest reasonable time of the decision to investigate, and of the person or persons selected to investigate and make the breach decision.

6.5 Deciding on the scope of the investigation

6.5.1 The scope of the investigation is determined by the preliminary judgements made about the allegations about the person's behaviour, whether or not all allegations need to be investigated and, if proven, which elements of the Code may have been breached.

6.5.2 The seriousness of the allegations, whether there is a reasonable possibility of identifying evidence that might prove or disprove the allegations, and the cost of gathering particular forms of evidence are some of the considerations in determining the scope of the investigation.

6.5.3 Agencies may provide general guidance to the breach decision-maker on which element(s) of the Code the person subject to misconduct action is suspected of breaching. However, the breach decision-maker needs to establish independently whether specific elements of the Code have been breached when making their decision.

6.5.4 There are two main approaches when considering which part of the Code to put to the person subject to misconduct action.

- A breach decision-maker may opt for multiple sections of the Code, depending upon the suspected misconduct, so that any final determination is more exhaustive.

[32] www.ag.gov.au/CrimeAndCorruption/FraudControl/Pages/default.aspx
[33] http://www.ag.gov.au/CrimeAndCorruption/FraudControl/Pages/default.aspx
[34] www.ag.gov.au/RightsAndProtections/FOI/Documents/AGIS%202011.pdf

- A decision-maker may choose one or two sections of the Code that are most relevant to the suspected misconduct.

6.5.5 It is advisable that the breach decision-maker is flexible at the start of the process about the approach. For example, if the suspected misconduct, if proven, is likely to lead to termination of employment, then selecting a larger but relevant number of elements may assist in defending an unfair dismissal application, should the Fair Work Commission not uphold some breaches of elements of the Code.

6.5.6 As the investigation progresses, the investigator or decision-maker may discover additional allegations and/or consider that the behaviours under investigation suggest additional elements of the Code may have been breached. In this circumstance, the person under investigation should be advised of the additional allegations and additional elements of the Code and be given a further opportunity to comment. This is consistent with the requirements in agency s15(3) procedures and the requirements of procedural fairness. Further information on procedural fairness requirements is provided in Part II, Section 6.10 *Procedural requirements* of this guide.

6.6 Notifying the person under investigation of the misconduct action

6.6.1 Section 43 of the *Australian Public Service Commissioner's Directions 2016* (the Directions) requires that a person suspected of misconduct be informed of certain matters before a determination is made. Many agencies do this in the form of a written 'notice of suspected misconduct'.

6.6.2 Any notice to the person suspected of misconduct must be consistent with the requirements in the agency's s15(3) procedures, which in turn must be consistent with section 43 of the Directions. Generally such a notice will explain:

- the behaviour the person is suspected of engaging in
- the element(s) of the Code they are suspected of breaching
- the full range of sanctions that may apply
- who will be investigating the suspected misconduct—if different from the decision-maker
- the decision-maker who will make the determination.

6.6.3 It is appropriate to attach to the notice advice about how the misconduct investigation process will proceed, a copy of the agency's s15(3) procedures and any relevant guidance material.

6.6.4 Consistent with the requirements of the *Privacy Act 1988*, consideration could be given to including a privacy collection notice in the notice of suspected misconduct. The purpose of the privacy collection notice is to advise the person under investigation that their personal information is being collected, the uses to which it will be put and the circumstances in which

it will be disclosed. For further information see Part I, Section 2.3 *Misconduct action consistent with privacy requirements* of this guide.

6.6.5 The notice of suspected misconduct could be signed, physically or electronically, by the person who has authorised the misconduct action or the decision-maker or investigator, in accordance with the agency's s15(3) procedures, guidance or policies. A copy of this notice should be retained on the misconduct file.

6.6.6 It may not always be possible to give the person suspected of misconduct complete details of the suspected breach at the outset of an investigation. In such cases, it is appropriate to inform the person in writing that an investigation has started and to outline the allegations as they are known at the time. The person should be advised that they will be given further detail about the allegations as the investigation progresses and an opportunity to make a statement in relation to the allegations and evidence, once the evidence has been gathered and before any determination is made.

Variations to the notice

6.6.7 During the course of an investigation, an investigator or decision-maker may:

- identify additional allegations
- identify additional evidence
- consider that the alleged behaviour might be more appropriately considered against an additional, or different, element of the Code.

6.6.8 Any changes or new information of this sort should be notified to the person under investigation, consistent with the agency's s15(3) procedures. The decision-maker must give the person a reasonable opportunity to respond to this new information, consistent with the agency's s15(3) procedures, before making a determination.

6.7 Other administrative arrangements

6.7.1 Agencies may also advise persons suspected of misconduct of the support available to them. In the case of current employees, the employee's manager may be able to provide support. Current employees may also seek support from the agency's employee assistance program. Both former and current employees may seek advice from the Australian Public Service Commission's Ethics Advisory Service. Generally, employees or former employees are not entitled to assistance in meeting legal expenses incurred in relation to misconduct action. Paragraph 2A of Appendix E to the *Legal Services Directions 2017* refers.

6.7.2 Other matters that an agency may need to consider are:

- how to manage the impact of the investigation on the workplace and colleagues of the employee under investigation

- whether the allegations point to business process or systemic risks that need addressing by the agency, for example improved financial control measures
- what action, if any, needs to be taken to protect the privacy of the employee under investigation and any witnesses, and the integrity and independence of the misconduct process, for example where the matters under investigation have been the subject of media comment or gossip in the workplace.

6.8 Investigating whether misconduct has occurred

Making arrangements to support the decision-making process

6.8.1 The outcome of misconduct action is heavily dependent on the quality of the investigation. Mistakes made in the investigation can lead to an unfair outcome and/or decisions being overturned on review. The person who undertakes the investigation, who may also be the breach decision-maker, needs to have the skills and resources to do the task effectively.

6.8.2 It may be necessary for an internal investigator, and/or decision-maker, to be released from some or all of their normal duties while they conduct the investigation to ensure a quality and timely process.

6.8.3 Agencies may also need to consider special accommodation arrangements, such as the provision of an office or a secure cabinet for storage of sensitive material. Investigators may also need access to agency or other experts to assist them in interpreting evidence or dealing with legal questions.

Formality and timeliness

6.8.4 The Directions stipulate that the process for determining whether an APS employee, or former employee, has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows. This means that the investigation needs to be conducted efficiently and effectively.

6.8.5 Ensuring timeliness is important for a number of reasons. Delays can affect the availability of reliable evidence, and the capacity of the person under investigation to respond fully to the case against them. For these reasons, among others, delays in investigations can reduce the possibility of reaching a concluded view on whether or not the person did what was alleged they had done. Unreasonable or extended delays in the investigation process, because of their effect on the person under investigation, can be a mitigating factor when deciding sanction. They are also factors that are likely to be considered by external review bodies.

6.8.6 While the process should be expeditious , this should not be at the expense of a properly conducted decision-making process consistent with agency s15(3) procedures, the requirements of procedural fairness or other administrative law principles.

Planning the investigation

6.8.7 It is good practice to develop an investigation plan which might consider the following issues:

- Who/what is being investigated?
- What needs to be found out in order to be able to make a supported and reasonable determination of whether there has been a breach?
- What evidence needs to be gathered and assessed in order to make findings and what are the potential difficulties in obtaining that evidence, if any?
- Who needs to be interviewed?
- How will the issue of confidentiality be handled in relation to the identity of the employee who reported the suspected misconduct or witnesses? This is particularly important if the allegation was made as a disclosure under the *Public Interest Disclosure Act 2013.*
- What are the privacy issues raised by this matter and what steps need to be taken to meet the agency's obligations under the *Privacy Act 1988*?
- Developing a timeline for the investigation.
- Whether legal advice is needed in a complex case.

Gathering the evidence

6.8.8 Evidence can be collected from various sources. For example in cases involving suspected improper access to personal information or improper use of email or internet, the investigation is likely to be founded on objective, physical evidence including records of computer use by the person suspected of misconduct.

6.8.9 Investigators are often required to interview the person suspected of misconduct and witnesses. It is important that the person suspected of misconduct understands the purpose of an interview. The purpose is usually to gather and test evidence to assist in establishing factual matters. An interview is not usually the primary means by which the person under investigation responds to the allegations. It is recommended that the interviewer explains the purpose of the interview, and where appropriate advises the person under investigation that they will be given other opportunities to respond to the case against them, before a decision is made.

6.8.10 An employee is generally bound to answer fair and reasonable questions relating to their activities as an employee. However, an employee suspected of misconduct cannot lawfully be directed to answer questions where this would tend to incriminate them in relation to a criminal offence or expose then to a finding of breach, including a possible sanction for that breach. There is a common law privilege against self-incrimination and a privilege against self-exposure to penalty. A refusal to respond to allegations of misconduct

cannot be assumed to be evidence that the alleged misconduct occurred. A former employee is not obliged to participate in a Code investigation. However, it may be in their interests to do so.

6.8.11 An interviewer may wish to consider the following good practice:

- providing the interviewee with sufficient notice to allow for adequate preparation
- where appropriate advising the interviewee that they may be accompanied by another person to provide support. It would be good practice to specify that the support person cannot speak on the interviewee's behalf
- considering whether it would be appropriate to make available to the interviewee, before the interview, any documents that will be discussed at the interview
- preparing a set of questions and, if necessary having them quality assured, to avoid vague or 'leading' questions i.e. questions that might be hard to respond to or that might influence how responses are given
- advising interviewees that personal information relating to them, or any other person, and any evidence they provide, may be disclosed to the others, including the person suspected of misconduct, where necessary and appropriate
- wherever possible seek corroborating evidence from the interviewee(s) of any claims they make
- indicating that a record of the discussion will be prepared and will be provided to the interviewee. The objective is to have jointly agreed records of interviews. If this cannot be achieved it is good practice to document the area(s) of disagreement
- advising the interviewee of the arrangements for confirming the accuracy of the record of the interview, recording any disagreements, and setting a timeframe for the interviewee to respond
- deciding before the interview whether it is to be audio-recorded. In this case it is usually appropriate to make a copy of the recording available to the interviewee. Where a written record of interview is to be prepared, it may be convenient to use a note-taker.

6.8.12 In addition to conducting an interview, investigators should consider gathering additional evidence suggested by the person suspected of misconduct, particularly if the person considers that this evidence will corroborate their version of events or otherwise disprove the allegations against them. Such requests should be evaluated in light of the relevance of the evidence and overall fairness of the process.

Privacy issues and third party information

6.8.13 Agencies may receive unsolicited personal information about third parties during a misconduct investigation. This could include information about family members and colleagues in circumstances where the family members and colleagues are not aware that this information has been collected. Agencies may wish to consider whether they have an obligation to notify the third party of the collection of their personal information in accordance with Australian Privacy Principle 5 *Notification of the collection of personal information*. Where agencies consider that notification would not be appropriate, for example because it would undermine the purpose of collecting the information, it would be appropriate to document that decision.

Advising the person suspected of misconduct of relevant evidence

6.8.14 Subject to the agency's s15(3) procedures, the investigator should:

- Provide the person under investigation with the evidence collected during the investigation and allow them to respond, comment or correct the record. As indicated in Part II, Section 7.2 in *Preparing a decision record* of this guide, it may be appropriate to provide a summary of the substance of the existing evidence and witness statements rather than the full documentation.
- Ensure that the employee has a reasonable opportunity to state their case, including any extenuating circumstances.

6.8.15 If new or conflicting evidence comes to light, that is relevant, credible and significant, reasonable steps must be taken to provide the person suspected of misconduct a reasonable opportunity to respond to that evidence before a decision on breach is made.

6.8.16 A proper record must be kept of the investigation material including copies of the evidence that is relied upon in making the decision. For information on record keeping obligations, see Part III, Section 8 of this guide.

Reviewing the evidence

6.8.17 In reviewing the evidence it is advisable to keep the following issues in mind:

- Has the employee suspected of misconduct been given a reasonable opportunity to respond to new or conflicting evidence?
- Have witnesses been questioned about evidence that conflicts with their witness statements?
- Has the response of the person under investigation been genuinely and fairly considered and have lines of inquiry suggested by that person been pursued where it is reasonable to do so?
- Is any evidence missing and is there enough is credible, relevant and significant, i.e. logically probative evidence, to be able to make findings of fact upon which a decision of breach or no breach could be made?

6.8.18 When making a judgement about the reliability of the evidence:

- primary sources of evidence are preferable to secondary sources. For example, hearsay evidence is of less value than a first-hand account.
- test disputed facts or seek corroboration from other witnesses or evidence, where possible
- consider the credibility of the witnesses—inconsistencies in evidence, honesty, possibility of collaboration or improper purpose
- a record of an event made contemporaneously is preferable to a record made days or weeks later.

6.8.19 Logical reasoning and good judgement are important when assessing evidence. Decision-makers may care to have regard to good practice guides prepared by the Administrative Review Council which are available on the Council's website.[35]

6.9 Investigation report

6.9.1 A good quality investigation report would:

- outline the nature of the suspected misconduct
- set out the steps taken to collect evidence and information
- outline the factual matters that need to be established to determine whether the employee under investigation did what was alleged. In order to do this the investigation report may need to establish a clear chronology of events
- present the evidence in a balanced way, including evidence both for and against the person suspected of misconduct
- acknowledge and consider the response by the person suspected of misconduct to the allegations and that person's response to any new or conflicting evidence that was uncovered in the course of the investigation
- if there is a conflict in the evidence, explain why one set of evidence is preferred over another
- outline the conclusions that are able to be made on the available evidence which need to flow logically from the evidence
- include reasons why the action or behaviour that is found on the evidence could be determined to be a breach of the element or elements of the Code.

[35] The Administrative Review Council (ARC) Best-Practice Guide *Decision Making: Evidence, Facts and Findings* provide guidance on how to gather and assess evidence. www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx

6.10 Procedural requirements

6.10.1 Misconduct investigations and decision-making must comply with an agency's s15(3) procedures. Investigations must also be conducted according to other law, including the requirements of procedural fairness and other administrative law.

Procedural fairness

6.10.2 Generally, administrative decisions, such as those taken in the misconduct process, must have regard to procedural fairness. Procedural fairness requires that:

- a decision-maker be impartial and be free of actual or apparent bias (the bias rule)
- a person whose interests will be affected by a proposed decision receives a fair hearing, including the opportunity to respond to any adverse material that could influence the decision (the hearing rule)
- findings are based on evidence that is relevant and logically capable of supporting the findings (the evidence rule).[36]

6.10.3 The right to procedural fairness arises only in relation to those people for whom the decision might adversely affect a right or interest. Usually this will be confined to the employee suspected of misconduct rather than, for example, witnesses or complainants.

Procedural requirements in the misconduct investigation

6.10.4 The agency s15(3) procedures will set out the procedural requirements for determining suspected misconduct. This may vary between agencies. The following are the minimum requirements in determining a breach of the Code:

- Consistent with section 43 of the Directions, the person suspected of misconduct must be informed of the details of the suspected breach. This means that they need to be informed of what it is that they were alleged to have done and what elements of the Code they are suspected of breaching.
    - This requirement is also consistent with 'the hearing rule' of procedural fairness.
- Consistent with section 43 of the Directions, the person suspected of misconduct must be informed of the sanctions that may be imposed.
- Consistent with section 43 of the Directions, the person suspected of misconduct must be given a reasonable opportunity to make a statement in relation to the suspected breach.

[36] See the Administrative Review Council (ARC) Best-Practice Guide *Decision Making: Natural Justice* for more information at www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx

- This requirement is consistent with ‘the hearing rule’ of procedural fairness.

- The person suspected of misconduct must be given a reasonable opportunity to respond to the evidence gathered during the investigation, including responding to any adverse material, before a decision is made.
    - Agency s15(3) procedures may require this but it is also consistent with ‘the hearing rule’ of procedural fairness.
- The breach decision-maker must give proper consideration to the person’s statement and response to the evidence before making the determination.
    - This is consistent with ‘the hearing rule’ of procedural fairness.
- If during the investigation new evidence comes to light about the person’s actions or behaviours, reasonable steps must be taken to notify the person suspected of misconduct of this evidence, in compliance with agency s15(3) procedures and given an opportunity to respond before a determination is made about breach.
    - This could include information suggesting possible additional breaches of the Code or that the allegations are more serious than originally thought.
    - Agency s15(3) procedures must advise the person under investigation of any variation in the suspected breaches, in compliance with section 43 of the Directions.
    - This requirement is consistent with ‘the hearing rule’ of procedural fairness.
- The decision-maker must act without bias or an appearance of bias i.e. the 'bias rule’ of procedural fairness. This includes having an open mind about the matters under investigation and weighing the evidence fairly and dispassionately.
- There must be facts or information that logically supports any favourable or adverse findings, i.e. the 'evidence rule’ of procedural fairness. For this reason, it is good practice for decision-makers to document reasons for their decision.

6.10.5 The hearing rule does not require providing all investigation material relevant to the allegation(s), but the person under investigation must be given sufficient details of the case against them to be able to respond properly. In some circumstances this will require providing all the evidence considered credible, relevant and significant to the investigation. In other circumstances it will be sufficient to summarise the evidence under consideration.

6.10.6 Credible, relevant and significant material may include adverse material that the decision-maker does not propose to rely on in making a particular finding or the decision on

breach. Depending on the circumstances it may be necessary for the person under investigation to be given an opportunity to comment on this.

6.10.7 The breach decision-maker may advise the person under investigation of their preliminary views about the alleged breach and give them an opportunity to respond. This might be in the form of a draft decision or report. It is not usually necessary to do this unless it is a requirement of an agency's s15(3) procedures. However, in some cases, it may be a sensible precaution to mitigate concerns that the person has not been given a fair hearing.

6.10.8 Procedural fairness does not always require that adverse material be put in writing. Subject to any requirement in agency s15(3) procedures, it may in some cases be appropriate to put adverse material to the person at an interview.

6.10.9 Additionally, it is not usually necessary to give an extended time period to respond to adverse material. It is common practice to provide for a period of seven days for the person under investigation to respond to the allegations and evidence before making the breach decision. A similar period is usually provided for response to a proposed sanction decision. However, a longer period may be appropriate depending on the complexity of the allegations and the evidence, and the particular circumstances of the person under investigation.

6.10.10 The rules of procedural fairness require that the employee be given a reasonable opportunity, not a perfect opportunity to put their case. This is determined by an objective standard; that is, what a reasonable person would believe was a reasonable opportunity given the circumstances.

Duty to inquire

6.10.11 The extent to which an investigator or decision-maker follows up a line of inquiry will be a matter of judgement. It is not necessary to follow up all matters but only those which are of substance and which, if established, will have a direct impact on the decision. In other words, if the available evidence strongly suggests a decision one way or the other, it may not be necessary to follow up on a particular question if the resolution of that question will not 'tip the balance'.

Grounds for review under the Administrative Decisions (Judicial Review) Act

6.10.12 Decision-makers needs to be familiar with the grounds for review in s5 and s6 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). A finding that a person has breached the Code may be invalid if the decision-maker:

- has not been appointed under the agency's s15(3) procedures
- fails to comply with the agency's s15(3) procedures

- makes a decision motivated by improper purpose
- exercises discretionary power in bad faith
- takes into account irrelevant considerations or fails to take into account relevant considerations
- acts at the direction or behest of another person
- acts unreasonably
- acts in accordance with a rule or policy without regard for the merits of the case
- acts on the basis of insufficient evidence.

6.11 Key points for agency guidance material

6.11.1 Guidance for decision-makers and investigators could:

- make a clear distinction between the agency's mandatory procedures established under s15(3) of the PS Act and any guidance material on misconduct investigations
- explain agency processes for choosing a breach decision-maker and investigator
- outline agency procedures for the appointment of a breach decision-maker
- ensure the decision-maker and any investigator are aware of the importance of being and perceived to be unbiased and independent
    - guidance material could also cover what to do if there are claims of bias
- emphasise the need for the decision-maker, and investigator if the roles are separated, to comply with the agency's s15(3) procedures
- describe agency processes for conducting an investigation, including advice on issues such as preparing records of discussion and taking witness statements
- advise on the different approaches to determining the scope of an investigation
- stress the importance of complying with the requirements of procedural fairness and other administrative law principles
- note the requirement for investigations to be carried out with as little formality and as much expedition as a proper consideration of the matter allows
- emphasise the need for planning the investigation before starting an investigation
- recognise the need to take the time needed to review the process to ensure all available relevant evidence has been collected
- note the importance of having a fair and independent investigation
- provide contact points for support and advice for witnesses, the person under investigation, the decision-maker and any investigator

- refer to, or adapt, the checklists for decision-makers in the appendices to this guide
- refer investigators and decision-makers to the Administrative Review Council better practice guides on administrative decision-making available at www.arc.ag.gov.au

7. The determination and sanction

7.1 Deciding on decision-makers

7.1.1 Subject to the agency's s15(3) procedures, the investigator, breach decision-maker and sanction decision-maker may be the same or different persons.

7.1.2 An agency's s15(3) procedures may require a separation of the roles of breach and sanction decision-maker. Even if they do not, it is recommended that these roles are undertaken by different people. This assists in minimising the risk of procedural flaws, including apprehension of bias and having regard to irrelevant considerations in making the decision.

7.2 Role of the breach decision-maker

7.2.1 The role of the breach decision-maker is to determine whether or not the person suspected of misconduct has breached the Australian Public Service (APS) Code of Conduct (the Code) in accordance with the agency's s15(3) procedures. Appendix 9 *Making a decision about a breach of the Australian Public Service Code of Conduct checklist* provides further guidance.

Responsibility for the decision

7.2.2 When a different person has undertaken the investigation, the breach decision-maker remains responsible for the decision. The decision-maker needs, separately and independently, to consider the evidence where an investigator has made a recommendation about whether a breach of the Code has occurred. The decision-maker reaches their own conclusions on the findings of fact and about breach.

7.2.3 Where a breach decision-maker has concerns about the recommendations made by an investigator, or about the investigatory process, a decision-maker may act on those concerns and take additional steps to correct procedural flaws or to satisfy themselves on particular matters. This might include writing to the person under investigation and giving them an opportunity to comment on the decision-maker's preliminary view about findings of fact and breaches of the Code before a decision is made.

Determining breach

7.2.4 The process of determining a breach of the Code requires the decision-maker to decide, after weighing the evidence, whether or not the person under investigation has done what they were alleged to have done, and then to decide, as a consequence, whether or not the person has breached particular elements of the Code.

7.2.5 In determining which elements of the Code have been breached it is important to focus on the element(s) most relevant to the behaviour. A targeted approach is consistent with the

concept that misconduct action in the APS has a corrective function. It is easier to explain to a person found to have breached the Code that their conduct was wrong, or inappropriate, if the elements of the Code are obviously relevant to the misconduct. Even if the case can be made for a number of elements, adding extra elements can be unnecessary, add complexity to decisions and provide confusing messages about the seriousness with which the behaviour is viewed.

7.2.6 There is no necessary link between the number of elements of the Code that an employee has breached and the severity of the sanction.

7.2.7 Where more than one element of the Code has been breached, each element will need to be considered separately in the final decision. See Appendix 5 *Elements of the Australian Public Service Code of Conduct* for further information about the meaning of each element of the Code.

7.2.8 A further factor to consider in making a decision on whether particular conduct represents a breach of the Code is the existence of extenuating circumstances. For example a decision-maker may conclude that the person under investigation has done what was alleged but has made an honest mistake rather than breached the Code. The extenuating circumstances leading to that mistake might include systemic issues such as a lack of adequate training, or problems with technology, leading to a number of similar mistakes by colleagues. It is important not to confuse extenuating circumstances and mitigating circumstances. The latter are relevant to sanction and are discussed in Part II, Section 7.3 *Factors to be considered in determining the sanction* of this guide.

Evidence does not support a finding of misconduct

7.2.9 It may become clear to the breach decision-maker in the course of the investigation that no breach has occurred or that there is insufficient evidence to base a finding that a breach has occurred. If this happens the decision-maker can either terminate the decision-making process or alternatively finalise the decision-making-process with a determination that the employee has not breached the Code. The person under investigation should be advised of the outcome.

Standard of proof

7.2.10 The standard of proof applicable to findings that the Code has been breached, including the findings of fact that support the breach determination, is the civil standard. That is, findings are based on the conclusion that it is more likely than not that the person suspected of misconduct has done what they were alleged to have done. This is referred to as ‘the balance of probability’.

7.2.11 Before reaching a finding the decision-maker needs to have regard to the seriousness of what is alleged and the consequences which might flow to the person suspected of misconduct if the allegations are proven. The level of satisfaction required on the civil standard of proof increases in accordance with the seriousness of the matter under

consideration. In *Briginshaw v Briginshaw* (1938) 60 CLR 336 the High Court of Australia indicated the need to act with proper care before finding that a serious allegation is established.

Preparing a decision record

7.2.12 A written record must be made of a determination of a breach of the Code, including details of the breach. If the person found to have breached was provided with a statement of reasons, the record must include that statement of reasons. See section 47 of the *Australian Public Service Commissioner's Directions 2016* (the Directions). Agency s15(3) procedures may prescribe the form of that written record.

7.2.13 A breach decision might include:

- a summary of the evidence considered by the decision-maker
- where the decision-maker also considered a recommendation from an investigator, the decision-maker's response to the recommendation, including reasons for accepting or not accepting the investigator's recommendations. The investigator's report could be attached to avoid the need to reproduce the detail of the report in the decision record
- findings of fact about what the person under investigation has done or not done. The findings need to be as specific as possible and, wherever possible, linked to specific events
- a decision as to whether what happened amounts to misconduct and, if so, which element(s) of the Code were breached
- the reasons for reaching these conclusions.

7.2.14 The Administrative Review Council (ARC) Best-Practice Guide *Decision Making: Reasons* provides guidance for administrative decision-makers on documenting reasons for decisions.[37]

Advising the former employee or employee of the breach decision

7.2.15 It is good practice to inform a person found to have breached the Code in writing of the breach determination decision and to advise them of their rights of review.[38]

7.2.16 Both employees and former employees found to have breached the Code have the right to seek review of the determination under s33 of the *Public Service Act 1999*

[37] The publication is available on the ARC website at www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx

[38] Where the Merit Protection Commissioner has conducted an investigation and made a decision, the finding is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

(PS Act). Seeking a review will not operate to stay the finding of breach or, in the case of employees, consideration of any sanction. For further information see Part III, Section 9 of on *Review of actions and other review options* of this guide.

7.2.17 An employee found to have breached the Code must be informed of the breach determination before any sanction can be imposed (section 44 of the Directions). A letter to the employee for this purpose could:

- enclose a copy of the breach determination decision record and, if appropriate, the investigation report, if any
- inform the employee of the process for deciding sanction
    - It may be appropriate at this stage to provide the employee with the details of the actually sanctions being considered and the factors under consideration in determining a sanction—see Part II, Section 7.3 *Making the sanction decision* of this guide for further information.
- as indicated, notify the employee of the right to seek review of the determination under s33 of the PS Act.

7.3 Making the sanction decision

The purpose of imposing a sanction on an employee

7.3.1 Once a determination has been made that an employee has breached the Code, the next stage in the misconduct process is consideration of an appropriate sanction.

7.3.2 Sanctions are intended to be proportionate to the nature of the breach, to be a deterrent to the employee and others and to demonstrate that misconduct is not tolerated in the agency.

7.3.3 Sanctions are also intended to provide a clear message to the employee that their behaviour was not acceptable. Where a sanction is too severe it is likely to be seen as unfair and may be counterproductive.

Imposing a sanction

7.3.4 A sanction can only be imposed on an employee who is found under the agency's s15(3) procedures to have breached the Code (section 44 of the Directions).

7.3.5 Other administrative action such as counselling, training, mentoring, closer supervision or mediation may be considered more appropriate than a sanction. Such actions may be taken in addition to a sanction if they are likely to assist the employee to change their future behaviour.

Sanction decision-maker

7.3.6 A sanction decision-maker is a person who has been given a delegation to impose a sanction from the range set out in s15(1) of the PS Act. This power could be delegated to a person outside the agency or outside the APS. The prior written consent of the Australian Public Service Commissioner must be obtained if an agency wishes to delegate the sanction decision-making power to a person who is neither an APS employee, nor a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth[39] (ss78(7) and (8) of the PS Act).

7.3.7 Further information on the role of the sanction decision-maker is at Appendix 10 *Sanction decision-making checklist*.

7.3.8 The framing of the delegation instrument should use broad language, bringing in relevant powers/functions under the PS Act and the Classification Rules 2000. The delegation instrument could be expressed in the following way.

> *I, [agency head name], [title], [agency], acting under my powers of delegation under the Public Service Act 1999 (the Act) and the Public Service Classification Rules 2000 (the Classification Rules), delegate to [name], my powers under the Act and the Classification Rules to impose on an APS employee in [agency] who has been found (under procedures established under subsection 15(3) of the Act) to have breached the APS Code of Conduct, the sanctions set out in subsection 15(1) of the Act.*

7.3.9 This gives the sanction decision-maker authority to impose the sanction of termination of employment under s29 of the PS Act, or to impose a reduction in classification under the Classification Rules, as well as the power to impose any of the other sanctions specified in s15(1) of the PS Act.

Separate sanction decision-maker

7.3.10 As set out in Part II, Section 7.1.2 of this guide, it is recommended that agencies separate the roles of breach decision-maker and sanction decision-maker, subject to the requirements in the agency's s15(3) procedures.

7.3.11 Having separate decision-makers does not prevent the breach decision-maker from recommending a sanction(s). However, the sanction decision-maker needs to exercise the sanction power independently, based on their consideration of the relevant matters. In making the sanction decision, the sanction decision-maker accepts, and acts on the basis of, the findings of the breach decision-maker.

Questioning the decision on breach of the Code

[39] That is a statutory office holder or another agency head

7.3.12 A sanction decision-maker may form the view that there has been a serious procedural flaw affecting the validity of the breach determination decision, for example a failure to give an employee an opportunity to comment on adverse material. A sanction decision-maker does not have the power to amend the breach determination nor to review the decision-making process. In these circumstances it may be appropriate to seek legal advice on available options.

Sanctions available

7.3.13 A sanction decision-maker may impose one or more of the following sanctions (s15(1) of the PS Act):

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of fine[40]
- a reprimand.

7.3.14 There is no provision in the PS Act for any other form of sanction, but other management action may be taken in order to reduce the risk of further misconduct e.g. restricting an employee's access to the internet following a finding of internet misuse. Any such action should clearly be cast as management action and not as a sanction.

7.3.15 A determination that misconduct has occurred does not necessarily mean that a sanction will be imposed. A decision can be taken that no other action is necessary or that other remedial action may be appropriate.

Consistency of sanctions

7.3.16 It is important that there is a degree of consistency within an agency in the use of sanctions for the same type of misconduct, where circumstances are essentially similar. However, there should not be a simple, 'formula driven' approach. Differences in sanctions between cases within an agency should reflect the particular circumstances of both the misconduct and the employee.

7.3.17 To assist in maintaining consistency, agencies may find it helpful to:

[40] Regulation 2.3 of the PS Regulations limits the deduction to no more than 2% of the APS employee's annual salary.

- consider limiting the delegation to apply a sanction to a small number of people within the agency and further limit the number of people with the delegation to impose more serious sanctions
- provide clear guidelines on the factors to be considered in deciding on sanctions
- have available a strong specialist corporate and/or legal resource that can be consulted by sanction decision-makers
- establish a database of cases and sanctions, and indicate that it can be consulted, having regard to privacy requirements, when deciding sanction.

7.3.18 Using a database to monitor cases and the imposition of sanctions also assists agencies to identify trends, for example in types and numbers of misconduct cases. Such databases would assist in responding to any request for information from the Australian Public Service Commissioner, for example in relation to the annual State of the Service Report.

Procedural fairness in the sanction process

7.3.19 Provisions in the PS Act and Directions emphasise the need to ensure procedural fairness in relation to any decision to impose a sanction on an APS employee.

7.3.20 Sanctions may only be imposed consistent with the agency's s15(3) procedures. In line with the Directions, the agency's s15(3) procedures must include a requirement to the effect that a sanction may not be imposed unless reasonable steps have been taken to

(a) inform the employee of:

i) the determination; and

ii) the sanction or sanctions that are under consideration; and

iii) the factors that are under consideration in determining any sanction to be imposed; and

(b) give the employee a reasonable opportunity to make a statement in relation to sanctions under consideration.

7.3.21 The employee should be informed of the sanctions actually being considered rather than the range of sanctions available. The employee must be given a reasonable opportunity to comment on the proposed sanction, and the factors under consideration, before a decision on sanction is made.

7.3.22 Employees should be informed, consistent with the agency's s15(3) procedures, of how long they have to respond and whether the response can be oral or in writing. What can be considered 'a reasonable opportunity' to respond to the proposed sanction(s) depends on the relevant circumstances, including the extent of the misconduct and the seriousness of the breaches, the capacity of the employee to respond, and the sanction under consideration. Whether the response is oral or in writing may depend on the complexity of the matters the employee wishes to raise and/or the capacity of the employee to provide a written statement.

7.3.23 The sanction decision-maker needs to consider the employee's comments before finalising the sanction decision. This deliberative process should include an impartial consideration of the employee's comments concerning both the sanction(s) that might be applied, and any information or personal factors that may be relevant to that decision. It is good practice for the decision-maker to document this deliberation.

7.3.24 If the sanction decision-maker is inclined to impose a *more severe* sanction than was communicated to the employee, the decision-maker must advise the employee and give them a further reasonable opportunity to comment.

Factors to be considered in determining the sanction

7.3.25 As indicated previously, taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the agency and the APS and thereby maintaining public confidence in public administration. Rather than seeking to punish the employee, an aim of misconduct action is to maintain proper standards of conduct by APS employees and protect the reputation of the APS. Sanctions are intended to be proportionate to the nature of the breach, provide a clear message to the relevant employee that their behaviour was not acceptable, be a deterrent to others and demonstrate that misconduct is not tolerated in the agency. Some guidance on what agencies may reasonably and lawfully do to use the processes for handling misconduct as general deterrence is included in in Part III, Section 10 *Quality assurance* of this guide. See also Part II, Section 7.5 *When particular sanctions may be appropriate* of this guide.

7.3.26 The sanction should focus on the seriousness of what the employee has done. The number of elements of the Code breached is not, of itself, a relevant consideration. Prior misconduct is relevant to the imposition of a sanction and might usefully be taken into account by the sanction decision-maker where it:

- indicates that the employee was, or should have been, well aware of the standard of conduct expected and the potential consequences of misconduct
- demonstrates that the employee may be unwilling to adhere to the standard of conduct expected.

7.3.27 Case law indicates a range of other factors that are, or may be, relevant in determining the level of a sanction. These are outlined below.

- The nature and seriousness of breach including:
    - the type of conduct involved e.g. discourtesy as compared to theft
    - amounts, values or quantities e.g. a minor degree of unofficial photocopying as compared to running a business using internal mail facilities
    - the period over which the misconduct occurred
    - evidence of any personal benefit from the breach

  - the actual and potential consequences of the employee's conduct.
- The degree of relevance to the employee's duties and the reputation of the agency and the APS, including
  - the seniority of the employee, with more senior employees generally expected to set an example for more junior staff, and required to exercise a greater degree of judgement
  - whether a breach of trust was involved
  - whether the nature of the breach has affected the confidence of the agency in the employee's ability to perform their current duties
  - any special job requirements e.g. to maintain professional and ethical standards
  - extent to which the misconduct affects the reputation of the agency and the APS.
- Whether the misconduct was uncharacteristic including:
  - the length of service, balancing a previously unblemished record against the expectation of greater awareness of behavioural requirements
  - whether there are records of previous counselling or breaches of the Code about related issues
  - the extent to which there is evidence that the behaviour is atypical—to assess this, the behaviour over a longer period may need to be examined e.g. any records of discussion with the employee within the last two years. Relevance of previous behaviour diminishes over time
  - the employee's attempts to stabilise any personal situations impacting on work, for example through accessing employee assistance schemes
  - support by colleagues and supervisors e.g. reports or references in relation to work performance and general character.
- Response to the misconduct, and the likelihood of recurrence including:
  - whether the employee admits the breach, shows a willingness to take responsibility, shows remorse and understands the seriousness of the breach
  - cooperation with the investigation
  - whether the employee has reflected on the action and how it can be avoided in the future and their commitment not to repeat the breach in the future
  - the effect of the proposed sanction on the employee, including any loss of earnings already incurred by the employee as a result of suspension.

- The presence of mitigating factors that may warrant the imposition of a lesser sanction than might otherwise have been imposed including:
    - the degree of responsibility for the breach and whether there was any provocation, persuasion, or even coercion, by other employees
    - the intention of the employee to breach the Code and whether the breach was premeditated or involved a spur of the moment decision
    - the extent to which an employee's disability, health or other factors may have influenced their conduct, although care needs to be taken not to imply different standards of conduct based on the personal circumstances of employees
    - age, experience and length of service
    - the level of guidance provided by the agency in relation to the Code in general and explicit guidance or directions about the particular breach, including existence of consistently applied policies
    - extent to which the breach may have reflected a culture or common practice in the work area which needs to be addressed as a systemic problem
    - any procedural issues, for example, unreasonable delay between the matter first coming to notice and the sanction being imposed.

7.3.28 Factors that may not be relevant would include claims that the employee found the misconduct process stressful or that the employee has incurred legal expenses.

Recording the sanction decision and advising the outcome

7.3.29 A written record must be made of the sanction decision. If the employee was provided with a statement of reasons, the record must include that statement of reasons (section 47 of the Directions). Agency s15(3) procedures may prescribe the form of that written record. A sanction decision might include:

- a description of the actions and behaviours and what elements of the Code were breached
- the decision-maker’s analysis of the evidence
- the decision-maker’s assessment of the seriousness of the breach
- the decision-maker’s assessment of aggravating and mitigating factors, if any
- the decision on whether or not a sanction needs to be imposed and, if not, the factors the decision-maker considers relevant to taking other management action as an alternative
- the sanction.

7.3.30 The employee should be promptly notified in writing of the sanction decision and of their review rights. See Part III, Section 9 *Review of Actions* of this guide for more information.

7.3.31 Any suspension from duty must end at this point (regulation 3.10(6) of the *Public Service Regulations 1999* (PS Regulations) refers).

Date of effect

7.3.32 The date of effect of a sanction will not necessarily be the same as the date on which the sanction was decided. It may be necessary to allow time for administrative action to be taken to put the sanction into effect, for example, organising an appropriate placement for a re-assignment of duties.

7.3.33 The date a sanction takes effect is not delayed where an employee applies for a review of the breach and/or sanction decision, by the Merit Protection Commissioner.

7.4 When particular sanctions may be appropriate

Termination of employment

7.4.1 Termination of employment is the most severe of sanctions. It may be appropriate where:

- the misconduct is so serious that it is no longer appropriate that the employee remain in the APS
- the employee, through their action, has repudiated a basic element of the employment relationship e.g. by indicating that they do not accept the need to follow lawful and reasonable directions from their managers.

7.4.2 APS employees whose employment is terminated are able to seek review in the Fair Work Commission (FWC) or the courts. Below are some FWC, Federal Court, or other courts cases where findings relating to the termination of employees were made.[41] The Australian Public Service Commission's page *Termination of employment* [42] is also relevant.

[41] The AGS Legal briefing 104 *Misconduct in the Australian Public Service* also provides information on unfair dismissal cases considered by the FWC.

[42] http://www.apsc.gov.au/working-in-the-aps/separation/termination

Examples of behaviour found to breach the Code confirmed as a valid reason for termination by the Fair Work Commission, Federal Court or other court

While every case needs to be considered in the context of its particular circumstances, examples of behaviour determined to be a valid reason for termination of employment by the Fair Work Commission (FWC) are provided below as a guide. It may also be helpful to agencies to be aware of observations made during hearings on a range of Code matters.

Repeated and consistent failure to treat persons with respect and courtesy, and without harassment, in connection with APS employment as required under s13(3) of the PS Act.

- An employee's employment was terminated after behaviour that included making blatantly false allegations, dogged refusal to acknowledge relevant policies and the Code, harassment of fellow employees and managers; concoction of assault stories; and inability to communicate with other staff and to conform to normal behavioural standards (*McKeon v Centrelink*, PR911316—this case also involved breaches of s13(1) and s13(5) of the PS Act).
- In another decision, the FWC noted that, despite warnings, the approach of the employee in relation to providing co-workers with respect and courtesy did not change (*Curr v ATO*, PR953053).
- An employee's employment was terminated, and the termination was upheld on appeal, when the employee continued to use extreme language to impugn the reputation of other employees in the department, make vexatious and malicious accusations about other employees, and failed to treat departmental employees and others with respect and courtesy and without harassment. (*Salmond v Department of Defence* [2010] FWA 5395 and on appeal *Salmond v Commonwealth of Australia (Department of Defence)* [2010] FWAFB 9636).

Serious failure to behave with honesty and integrity (as required under s13(1) of the PS Act)

- failure to disclose dismissal from previous employment for Code breaches along with failure to declare participation for profit in a private sector company whose business related to the business of the agency (also breached s13(9) and (11)) (*Ahmed v Department of Immigration and Multicultural Affairs*, PR916461).
- misuse of departmental credit card (*Department of Employment and Workplace Relations v Oakley*, PR954267—also involved breach of s13(5), (10) and (11)). This decision is also significant in that the Full Bench held that it was appropriate and reasonable to delay taking Code action so as not to prejudice criminal

proceedings about the same matter, and that the decision to place the employee on alternative, restricted duties was appropriate and preferable to suspension.

Failure, generally repeatedly, to comply with lawful and reasonable directions (as required under s13(5) of the PS Act)

- directions in relation to return to duty (*A Romanov-Hughes v Department of Defence*, PR920194).

Serious misuse of Commonwealth resources (relating to s13(8) of the PS Act)

- receiving, storing and sending pornographic or otherwise sexually explicit emails or other offensive material using the employer's email system (*Williams v Centrelink*, PR942762—also found to be a breach of s13(11)—and *O'Neile v Centrelink*, PR973658).

Reduction in classification

7.4.3 Reduction in classification is an appropriate sanction where, based on the misconduct, the employee can no longer be trusted to perform the duties of their current position, or another position, at the same level of responsibility. For example, a reduction in classification may be the best sanction where an employee has demonstrated by their behaviour that it is not appropriate for them to have any supervisory responsibilities.

7.4.4 Reduction in classification is also appropriate where termination of employment would be warranted but for mitigating factors that suggest that the employee should be given a chance to redeem themselves.

7.4.5 Discussions need to take place within the agency to ensure that duties are available at the classification level proposed, before the sanction of reduction in classification is imposed.

7.4.6 A reduction in classification cannot be made for a specific period. The employee remains at the reduced classification until he or she secures higher duties or a promotion to their original, or higher, classification in line with normal merit-based selection. See also Part III, Section 8 *Considering misconduct in the selection process* of this guide.

7.4.7 An employee reduced in classification under s15(1)(b) of the PS Act would have their salary reduced commensurately. The sanction decision-maker needs to consider the agency's pay scales and specify not only the new classification but also the appropriate pay point within the classification. Factors to consider include:

- The level to which an APS employee's salary is to be reduced may be informed by the terms of the industrial agreement applying to their employment.

- Where the level to which an employee's salary is to be reduced is not clear from the relevant industrial agreement, it is recommended that the sanction decision-maker impose two sanctions—a reduction in classification under s15(1)(b) and a reduction in salary under s15(1)(d)—to ensure that there is authority to reduce the salary to a particular point. It is possible for more than one sanction to be applied to an employee found to have breached the Code; if the sanction decision-maker is satisfied that more than one sanction is appropriate in the circumstances.

7.4.8 Where a sanction decision-maker has not relied on the powers in s15(1)(b) and (d) to reduce classification and specify a lower salary, it would be appropriate to place the employee on the top pay point at the lower classification.

Re-assignment of duties

7.4.9 The sanction of re-assignment of duties at the same classification level, including to a different location, may be appropriate where the conduct in question does not warrant termination of employment but the integrity and effectiveness of the APS may be compromised if an employee is not removed from a particular location or from their present duties. For example, this could occur where:

- the nature of the employee's conduct is such that it may be difficult for colleagues to continue working harmoniously with them
- an employee is no longer trusted to perform a particular aspect of their current duties.

7.4.10 The re-assignment of duties may be obvious to colleagues and the subject of gossip and speculation. Agencies need to consider options to communicate this decision in a way that minimises speculation and other possible adverse consequences.

7.4.11 Where the re-assignment of duties involves a change of location, it is advisable to take into account the impact on the employee, such as the financial costs, and the effect of dislocation on the employee and his or her family. The sanction delegate should also take into account the financial impact on the employee of loss of allowances, such as shift work allowances, where relevant.

7.4.12 A re-assignment of duties may be imposed for a defined period if it is considered appropriate to return the employee to their former duties after a specific period.

Reduction in salary

7.4.13 A reduction in salary can be used to reinforce the seriousness with which the employee's conduct is viewed. It may be appropriate where the employee's conduct does not indicate that he or she understands the seriousness of the breach they have committed.

7.4.14 A reduction in salary can be imposed for a specified and temporary period or an unspecified period. A reduction in salary should be imposed in a reasonable and

proportionate way. For this reason, it is advisable that agencies set the reduction in salary for a specified and temporary period and state that period clearly in the sanction decision.

7.4.15 At the end of the period of reduced salary, the employee is entitled to be paid the salary at the level the employee would have received if they had not been subject to a temporary reduction in salary.

7.4.16 The amount of salary to be reduced is a matter for the sanction delegate. However, as this is a different and possibly a lesser sanction than a reduction in classification, the reduction in salary could be an amount valued at less than a reduction in classification.

7.4.17 Generally, any reduction in salary will be subject to a subsequent salary event, such as a promotion or a salary increase provided for in an industrial agreement. The likelihood of such events occurring during a period of temporary reduction should be considered by the sanction decision-maker, given that the effectiveness of the sanction may be reduced. It is, however, possible for an agency to impose a salary reduction for a specified period that makes provision for how the reduction would interact with any subsequent salary event. The sanction decision could state, for example, that there will be 'a reduction of 10% in the salary which would otherwise be payable from time to time over a 12-month period'.

Deductions from salary (fine)

7.4.18 This sanction may be appropriate for less serious breaches, where the agency needs to reinforce its concerns about the employee's conduct by way of short term financial impact. A sanction of a fine may be imposed by way of a one-off deduction or by deducting an amount from salary each pay for a short defined period. Deductions over a lengthy period would minimise the impact of the sanction. It is appropriate for the sanction decision-maker to decide the period of deductions taking into account any mitigating factors, including financial hardship, raised by the employee.

7.4.19 Deductions from salary are limited to no more than 2% of an employee's annual salary. In determining the upper-limit of a fine in a particular case, the decision-maker needs to consider the meaning of the term 'salary' as provided for in the agency's remuneration arrangements.

Reprimand

7.4.20 A reprimand is the least severe form of sanction and is most appropriate in situations where the misconduct is not of a grave nature, or where it is clear that the employee has learned from the misconduct process and presents no appreciable risk of further misconduct.

7.4.21 A reprimand acts as both a mark of disapproval of past conduct and as a warning for the future. A reprimand is not counselling but rather delivers a clear message to the employee that their behaviour was found to be below the acceptable standard.

7.4.22 Consideration also needs to be given to who would be the most effective person to deliver the reprimand. Generally a reprimand delivered by a higher level manager will carry greatest weight.

7.4.23 A reprimand is subject to the same standards of recordkeeping as other sanctions. For this reason it may be practical for the reprimand to be administered at a face-to-face meeting, with a written record of the reprimand, which is provided to the employee at the conclusion of the meeting, and a copy placed on the misconduct file.

7.5 Applying multiple sanctions for one breach

7.5.1 It is possible to impose more than one sanction, if the sanction decision-maker is satisfied that more than one sanction is appropriate in the circumstances. For example, an employee may be re-assigned duties and have a fine imposed, be reprimanded and have another sanction applied, or, as described above, an employee may have both their salary and classification reduced.

7.6 Applying sanctions for multiple breaches

7.6.1 It is not necessary to impose a separate sanction for each breach of an element of the Code. However, where the breaches are unrelated, for example a harassment incident and an unrelated theft, separate sanctions may be appropriate.

7.6.2 When an employee has breached several elements of the Code it is necessary to consider the totality of the behaviour and its seriousness when considering sanction(s) to ensure the total effect is in proportion. The total effect should be neither too harsh nor too lenient, in relation to the seriousness of the breaches when considered as a whole. This has been described as the totality principle: 'take a last look at the total to see whether it looks wrong' (*Mill v The Queen* (1988) 166 CLR 59).

7.7 Examples of sanction decisions

7.7.1 The Merit Protection Commissioner publishes summaries of decisions made after reviewing agency misconduct decisions, including sanction decisions. [43] These case summaries may be helpful when considering an appropriate sanction.

7.8 Employee moves to another APS agency before a determination or a sanction is made

7.8.1 An agency may become aware that an employee has received a job offer from another agency after the employee has been notified, in accordance with the agency's s15(3) procedures, that they are suspected of misconduct. Any move between APS agencies under

[43] See http://meritprotectioncommission.gov.au/mpc-resources/summaries-of-cases-folder/case-summaries

s26 of the PS Act, in this circumstance, will generally be deferred by the operation of sections 37 and 38 of the Directions.

7.8.2 Those sections provide that, unless the original agency head (the 'losing agency') and the new agency head (the 'gaining agency') agree otherwise, the movement, including on promotion, does not take effect until the misconduct action is resolved. The misconduct action is resolved by either:

- a determination being made under the agency's s15(3) procedures about the suspected misconduct, or
- a decision that a determination is not necessary.

7.8.3 Where an employee suspected of having breached the Code moves, with the agreement of the agency heads, before the misconduct action is resolved, the gaining agency may initiate an investigation into the suspected misconduct in accordance with the gaining agency's s15(3) procedures.

7.8.4 It would be open to the agency head of the gaining agency to use the expertise of employees from the losing agency in conducting a misconduct investigation. Regulation 9.2 of the PS Regulations allows the losing agency to disclose information to the gaining agency where it is relevant to the agency head's employer powers, including a misconduct investigation in the gaining agency.

7.8.5 Where an employee moves after a finding of a breach, but before the imposition of a sanction, it is not necessary for a fresh investigation to be carried out. A sanction delegate in the gaining agency head can impose a sanction, in accordance with the gaining agency's s15(3) procedures, on the basis of the losing agency's finding of breach. An agency head's power under s15 of the PS Act to impose a sanction extends not only to employees found under that agency's s15(3) procedures to have breached the Code, but also to employees found to have breached the Code under another agency's s15(3) procedures.

7.9 Machinery of Government changes

7.9.1 Section 72 of the PS Act deals with machinery of government (MOG) changes. When an employee who is the subject of a misconduct investigation is moved from their agency to another under s72 of the PS Act it is open to the gaining agency to decide whether it wishes to continue action to determine whether the employee breached the Code in the previous agency. This might be influenced by, for example, the seriousness of the suspected misconduct, and the relevance of it to the business of the gaining agency, or the seniority of the employee.

7.9.2 If the gaining agency decides to conduct an investigation, the investigation must be conducted under the gaining agency's s15(3) procedures.

7.9.3 The Australian Public Service Commissioner may determine special arrangements in respect of an employee moved under MOG changes if certain circumstances exist concerning

the employee's employment. Section 72(5A) of the PS Act and regulation 8.3 of the PS Regulation set out these circumstances. They include where:

- a Code investigation is underway in the former agency
- a sanction is imposed in relation to a Code investigation, including a sanction that may have continuing effect, and
- an employee is suspended in their former agency in response to a suspected breach of the Code.

7.9.4 It is important that agencies consider this when a MOG change is under discussion. Agencies can seek further advice from the Australian Public Service Commission if a determination of this type is considered appropriate.

7.10 Effect of misconduct findings on an employee's security clearance

7.10.1 The Australian Government Security Vetting Agency (AGSVA) advises that it is the responsibility of security clearance holders to report to AGSVA any changes in their circumstances, including disciplinary procedures. AGSVA will assess the change in circumstances. Not all changes in personal circumstances require action.[44]

7.10.2 It would be good practice for agency guidance material to include information on how findings of breaches of the Code by security clearance holders are to be reported to AGSVA. It is recommended that this be done in consultation with the agency's security area.

7.11 Key points for agency guidance material

7.11.1 Agencies may wish to consider developing a checklist and a template for reports and sample letters to assist decision-makers and to ensure both consistency in reporting standards and the quality of the decisions. The checklists in the appendices to this guide may be useful in developing agency checklists.

7.11.2 Agency guidance material could include the following:

- advice on the role of the breach decision-maker and sanction decision-maker
- emphasis on the need for breach decision-makers and sanction decision-makers to follow agency s15(3) procedures and to have due regard to procedural fairness
- advice for the breach decision-maker and sanction decision-maker about preparing a decision record
- advice on any processes used within the agency to monitor the quality of breach of the Code decisions

[44] www.defence.gov.au/agsva/

- an explanation of the sanctions that can be imposed
- the factors to be considered in determining an appropriate sanction
- some agency-specific examples of when particular sanctions may be appropriate
- the importance of consistency within agencies in imposing sanctions
- references to sources of advice such as databases, the agency HR manager or other corporate expertise, this guide, the Merit Protection Commissioner's case summaries, and the Australian Public Service Commission's Ethics Advisory Service
- cover the handling of situations where evidence does not support misconduct having occurred
- advice on how to handle a case where an employee moves to another agency
- guidance on how findings of breaches of the Code by security clearance holders are to be reported.

Part III: Record Keeping, Reviews and Quality Assurance

8. Recordkeeping and access to records

8.1 Recordkeeping requirements

8.1.1 The *Archives Act 1983*, the *Freedom of Information Act 1982* and the *Privacy Act 1988* are relevant to record keeping and access to, and use of, records in respect of misconduct actions. This Section covers record keeping with respect to employees and former employees.

8.1.2 Records relating to misconduct action need to be kept separate from the personnel file of the employee or former employee concerned. The existence of a separate misconduct file should, however, be noted on the personnel file e.g. by cross-reference.

8.1.3 Files of this kind are to be classified *Sensitive—Personal* and held in secure storage.

8.1.4 Access for management purposes should be allowed only on a need-to-know basis. Delegates who are deciding a sanction for subsequent misconduct should have access to these records to allow them to give proper weight to the employee's prior misconduct in deciding the appropriate sanction.

8.1.5 It is appropriate for material placed on the misconduct file to include:

- all correspondence with the employee or former employee subject to misconduct action, including the letter(s)
    - informing them they are suspected of breaching the Code
    - that sets out the 'case against them'
    - advising them of the final determination decision
    - outlining the proposed sanction and the reasons for it, and
    - advising them of the sanction and their review rights
- any attachments to the correspondence
- decision records and/or statements of reasons with respect to the breach determination and any suspension or sanction decisions
- all relevant email correspondence relating to the investigation, decision-making or imposition of a sanction
- all material associated with planning the investigation, such as records of telephone calls, letters or emails organising interviews
- the investigation report with all the evidence relevant to the breach and sanction decisions attached, such as IT records and transcripts of witness interviews

    - Where the agency engaged an investigator external to the agency, upon completion of the investigation, the agency should require the investigator to give the agency the investigation report, the evidence relevant to the breach decision and any sanction decision for the file.
- copies of any draft material provided to the employee for comment
- the employee's response to the correspondence.

8.2 Retention periods and disposal

8.2.1 The National Archives of Australia's Administrative Functions Disposal Authority Express (AFDA Express) of February 2013 sets out the minimum retention requirements for which various classes of records relating to counselling and misconduct matters are to be retained. AFDA Express is a legal instrument issued under the *Archives Act 1983* and the advice provided below is consistent with this.

8.2.2 Records relating to counselling and misconduct include:

- allegations of misconduct where no investigation is made
- investigations that are carried out under an agency's s15(3) procedures but no findings of a breach of the Code are made
- investigations of alleged breaches of the Code, including matters which formed the basis for those investigations
- reviews of, or litigation about, misconduct action
- decisions about the imposition and implementation of a sanction.

8.2.3 AFDA Express sets out minimum retention periods for these types of documents. Full details can be accessed through the National Archives of Australia website.

8.2.4 AFDA Express provides a useful benchmark of contemporary Australian Public Service (APS) norms as to the minimum length of time that previous conduct is regarded as still relevant to later decisions affecting the employee, including decisions about sanctions arising from subsequent misconduct action. AFDA Express sets a minimum standard rather than an absolute limit. The decision about whether records should be kept for a period longer than the minimum established by AFDA Express rests with the agency.

8.2.5 Agencies need to establish policies that set out how long different records are to be retained in the agency. Not all documents of the same type need to be kept for the same amount of time, however, agencies should strive for consistency. It is good practice for these policies to be readily available to all employees.

8.2.6 In determining how long records are to be retained, agencies need to take into account the purpose of taking misconduct action. Such action is primarily aimed at protecting the integrity of the agency and the Australian Public Service (APS) and thereby maintaining

public confidence in public administration. The aim of misconduct action is to maintain proper standards of conduct by APS employees and protect the reputation of the APS rather than punish a person for the rest of their working life. Timeframes for retaining records need to be fair and reasonable and reflect a balance between the needs of the agency, the employee and the public interest.

8.2.7 Agencies should ensure that records are destroyed in accordance with agency policies and procedures.

8.2.8 Included below are the minimum requirements relating to records of misconduct matters contained in AFDA Express. AFDA Express also provides direction on the retention of other records that may be relevant to misconduct matters.

Findings of no misconduct, including allegations where an investigation is not undertaken

8.2.9 Where an investigation results in a finding of no breach of the Code, records should be kept for 18 months after that decision is taken. However, a longer period, as specified below, may apply where the employee or former employee requests it. That longer period is:

- until the employee or former employee reaches the age of 75, or
- 7 years after the last action relating to the suspected misconduct.

8.2.10 The employee, or former employee, may also request that the records be destroyed at a specified time.

8.2.11 If a decision is made not to investigate an allegation of misconduct, for example because there is no utility in investigating the matter or the allegation is considered frivolous or vexatious or without substance, all records are to be kept for at least 18 months after the last action in the file.

Investigation not finalised

8.2.12 If an agency decides to discontinue an investigation into suspected misconduct, for example the employee resigns during the course of an investigation, documents that have been obtained or created up to the date the misconduct process was discontinues should be retained on a separate misconduct file and kept in accordance with agency policies for at least 18 months.

Findings of misconduct

8.2.13 If, in the period of five years after a finding of misconduct is made against an employee or former employee, there have been no new breaches of the Code:

- the misconduct record may be destroyed and any cross reference in the person's personnel file removed

- the employee or former employee should be informed in writing that the misconduct record has been destroyed and that any reference in their personnel file has been removed.

8.2.14 If an employee or former employee, who has been determined to have breached the Code, is found to have breached the Code again within five years of that determination, the records of prior misconduct should be kept for a further period of five years, dating from the time of the new determination.

8.3 Access to misconduct records

8.3.1 Misconduct records contain sensitive information and are to be available within an agency on a need-to-know basis. Nonetheless regulation 9.2 of the *Public Service Regulations 1999* (PS Regulations) allows misconduct records to be disclosed and used where:

- the use is relevant or necessary for the exercise of an employer power, *and*
- the use or disclosure is consistent with any guidelines issued by the Australian Public Service Commissioner.

8.3.2 Misconduct records are only disclosed on a case-by-case basis having careful regard to any Commissioner guidelines and the Australian Privacy Principles (APP). This issue arises most frequently in relation to the consideration of sanctions for later misconduct or in the context of staff selection and placement processes. However it could also arise in other processes such as security clearances, organisational suitability assessments and performance management processes.

Transferring to a new agency

8.3.3 Misconduct records form part of the personnel file, although they are not physically attached to the personnel file, and follow the employee as they move between agencies as the personnel file does.

8.3.4 When passing misconduct records to a new agency, agencies should ensure that the employing agency is aware of the recordkeeping guidelines that apply to the misconduct record, including retention periods, and advise the agency when any material is able to be destroyed.

8.4 Considering misconduct in the selection process

8.4.1 An APS selection process is the means by which an agency gains relevant information about the ‘work-related qualities’ of internal and external candidates for APS jobs. These

qualities may include skills and abilities, standard of work performance and relevant personal qualities genuinely required for the duties.[45]

8.4.2 Candidates should be asked for information on their previous work history. This includes whether the candidate has been or is being investigated for suspected breaches of the Code with respect to APS employment, and, where relevant and depending on the length of their APS employment, any codes applying to non APS employment. It is important that agencies take all reasonable steps to check the accuracy of the information provided. In providing information, candidates are obliged to adhere to the standards of honesty and integrity expected by the Code.

8.4.3 Candidates who are not APS employees at the time they provide this information are also obliged to meet this standard. Section 15(2A) of the *Public Service Act 1999* (PS Act) provides that APS employees could be found to have breached the Code if, as candidates for engagement, they:

- knowingly provide false or misleading information
- wilfully fail to disclose information that they knew, or ought reasonably to have known, was relevant, or
- otherwise fail to behave honestly and with integrity.

8.4.4 Having a work history that includes a finding of misconduct, or an investigation for suspected misconduct, is not necessarily a relevant factor in deciding whether a candidate is suitable for a job vacancy. If a candidate discloses prior misconduct, or the selection delegate or panel is aware of prior misconduct, a decision on whether the candidate is suitable must be based on an assessment of the work-related qualities of the candidate against the work-related qualities genuinely required for the duties.

8.4.5 A delegate in a selection process may choose to rely on the honesty of candidates' declarations about their prior conduct records. It would, nonetheless, be prudent for a delegate to confirm that information with the candidate's current agency or employer. If the candidate is an APS employee, regulation 9.2 of the PS Regulations allows for the disclosure of this information where that is necessary for, or relevant to, employer powers including with respect to a selection process.

8.4.6 When considering a previous breach of the Code in the context of a selection process, the following factors may be relevant:

- the nature of the breach
- the sanction imposed

[45] See s10A(2) of the PS Act.

- how long ago the breach occurred
- the nature of the duties being performed at the time
- the duties of the job that is being filled
- whether this was a one-off action or indicative of a pattern of behaviour.

8.4.7 Where information about the past misconduct of a candidate is being taken into account as part of a selection process, the candidate should be advised of the matters being considered and provided with reasonable opportunity to comment before the selection decision is made.

8.4.8 If a candidate is the subject of a misconduct investigation that has yet to be finalised, care needs to be taken not prejudge the outcome of the investigation while ensuring the work related qualities of the candidate are appropriate for the duties to be performed. If, after the assessment of the candidate's work-related qualities, the candidate is preferred, the available options include:

- awaiting the outcome of the investigation, if practical
- proceeding with the assignment of duties or movement if the proposed breach is minor and not significant in the operational context of the employing agency
- offering the person a temporary assignment or movement pending the finalisation of the investigation.

8.4.9 Agencies may wish to consider advising candidates, in agency applicant information packs, that information regarding their previous behaviour, including any history of misconduct, will be sought from current or previous employers.

Referee reports and misconduct

8.4.10 It is a common practice for APS agencies to ask employees seeking promotion or movement at level to obtain a referee report from their current supervisor or manager.

8.4.11 The Australian Privacy Principles in the *Privacy Act 1988* apply to providing references, including with respect to previous misconduct.

8.4.12 Supervisors should avoid any comment in a referee report that is unrelated to the employee's work performance. Any comment that is made should be relevant to the work-related qualities of the job sought, as advised by the selection panel.

8.4.13 In determining whether to disclose information on a prior, or suspected, breach of the Code, factors to take into account include:

- the nature of the breach or suspected breach
- how long ago the breach occurred
- the duties being undertaken at the time
- the proposed duties of the new work
- the employee's conduct since the breach.

8.4.14 An employee whose conduct is under investigation may ask a referee from the agency to provide a reference to support a job application. Where the matters being investigated may be relevant to the work-related qualities required for the job, the referee could indicate that there have been concerns as yet unresolved. Care needs to be taken to avoid being seen to prejudge the situation.

8.4.15 Where an investigation has concluded that the employee did not breach the Code, it would generally be inappropriate for the referee to refer to the investigation. However, the investigation may be referred to where it resulted in findings relating to the performance or attitude of the employee, which, although not amounting to misconduct, may nevertheless reflect on the employee's suitability for the job in question.

8.4.16 If a breach of the Code has been determined, and where the breach is considered relevant, the referee may include an outline of the circumstances surrounding the breach and comment on the relevance of the breach to the work-related qualities required for the job.

8.4.17 In all cases, the weight to be given to records of determined misconduct will diminish over time.

8.5 Key points for agency guidance material

8.5.1 Agencies may wish to include in their guidance material information on the following:

- agency recordkeeping procedures and appropriate contact points within the agency
- agency's policies on the retention and disposal of conduct-related records and who is responsible for ensuring the policy is applied
- guidance on consideration of misconduct records in making staff selection decisions. Such guidance may more appropriately be placed in the agency's recruitment and selection procedures.

9. Review of actions and other review options

9.1 Fair employment decisions

9.1.1 One of the Australian Public Service (APS) Employment Principles is that the APS makes fair employment decisions with a fair system of review. Under s33 of the *Public Service Act 1999* (PS Act), APS employees are entitled to review of actions or decisions that relate to their APS employment, with some exceptions. The *Public Service Regulations 1999* (the PS Regulations) provide limits and exceptions to the right of review.

9.1.2 Division 7.3 of the PS Regulations extends that review right to former employees found after separating from the APS to have breached the Code.

9.2 Eligibility for review

Current APS employees

9.2.1 Non-Senior Executive Service (SES) employees who have been found to have breached the Code of Conduct (the Code) and who wish to challenge either the determination that a breach has occurred, or the sanction imposed, or both, may lodge an application for review with the Merit Protection Commissioner under Division 5.3 of the PS Regulations.

9.2.2 In addition to these decisions, other decisions relating to the investigation for suspected misconduct may also be reviewable including, for example, a decision to suspend an employee from duties or to re-assign an employee's duties temporarily while a Code investigation is underway. These decisions are reviewable in the first instance by the relevant agency head.

Former APS employees

9.2.3 A former non-Senior Executive Service APS employee may also seek a review of a determination that they breached the Code where the determination was made after the employee ceased APS employment. The relevant provisions are in Division 7.3 of the PS Regulations. As no sanction can be imposed on a former employee, there is no provision for former employees to have review rights in relation to sanction decisions.

9.3 Other avenues for review

Termination of employment

9.3.1 An employee whose APS employment has been terminated for misconduct cannot apply for review of that decision under s33 of the PS Act but may have access to the remedies under the *Fair Work Act 2009* by making an application to the Fair Work Commission.

Other grounds for review by the Fair Work Commission

9.3.2 Employees and former employees may have other grounds for seeking remedy under the Fair Work Act, including the general protections provisions in the Act. Further information is available from the Fair Work Commission at www.fwc.gov.au.

Judicial review

9.3.3 Employees and former employees may also have access to review by the courts, generally on a question of law, rather than the merits of the decision. For example, under the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Circuit Court of Australia and the Federal Court of Australia have the power to review certain decisions. Generally, the courts' role is to ensure that decision-makers acted fairly and within the law and followed proper procedures in coming to a decision. The time limit for such applications is usually 28 days from being notified of the relevant decision. The websites for the courts are at www.federalcircuitcourt.gov.au and www.federalcourt.gov.au.

9.4 Key points for agency guidance material

9.4.1 It is good practice to include information about review rights in agency guidance material and advice in letters advising employees of Code decisions. In particular it would be helpful for guidance material to:

- advise employees, and former employees, of their rights of review under s33 of the PS Act and to link to the relevant information on the Australian Public Service Commission's website www.apsc.gov.au/merit
- advise employees whose employment has been terminated of their right of review by the Fair Work Commission and to link to the relevant information on the Fair Work Commission website.

9.4.2 In relation to decisions about suspension, agency guidance material will need to include advice that regulation 5.27(5) of the PS Regulations requires an agency head to tell an employee of their right of review to the Merit Protection Commissioner following any internal review by the agency head in accordance with s33 of the PS Act.

9.4.3 Agencies may wish to consider whether to include advice about the general protections provisions in the Fair Work Act and the option of judicial review.

9.5 Further information on reviews by the Merit Protection Commissioner

9.5.1 Further information on reviews of Code of Conduct decisions under the PS Act, including the role of the Merit Protection Commissioner, are on the Merit Protection Commission website at http://meritprotectioncommission.gov.au/home.

10. Quality assurance

10.1 Quality assurance

10.1.1 The following quality assurance mechanisms are good practice and assist in delivering quality outcomes and good governance for misconduct action.

Good practice policy and procedural guidance

10.1.2 Agencies may wish to consider the following approaches to developing policy and procedural guidance on the misconduct framework:

- Having process advice available to all employees about the management and reporting of suspected misconduct, including internal agency arrangements for reporting misconduct and public interest disclosures.
- Providing managers with better practice guidance on deciding how to respond to unacceptable behaviour, including whether or not to refer it for investigation as suspected misconduct, to ensure fairness and consistency in the treatment of suspected misconduct.
- Regularly review agency guidance material on reporting and managing suspected misconduct to ensure it is up to date, including contact details of agency practitioners and external sources of advice, for example the Australian Public Service Commission's Ethics Advisory Service.[46]
- Include a requirement in the agency's performance management system, tailored to the different responsibilities at different classification levels, to demonstrate knowledge of, and commitment to, the Australian Public Service (APS) Values, APS Employment Principles and the APS Code of Conduct (the Code).

Practices to support quality decision-making

10.1.3 Agencies may wish to consider the following approaches for ensuring the quality of decisions about misconduct.

- Processes for ensuring that the decision-maker who determines whether a breach has occurred has the necessary skills, experience and capability and providing that decision-maker with support and resources to do their job effectively.
- Having decision support tools for decision-makers, including checklists to ensure that procedural steps have been completed appropriately and good records kept.

[46] http://www.apsc.gov.au/working-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee

- A quality assurance process for Code investigations and decisions, independent of the decision-maker, to check for compliance with procedures, consistency of decisions, timeliness and quality of outcomes.
- Considering whether to have separate breach and sanction decision-makers.
- Limiting the number of people in the agency who hold a delegation to decide sanction.
- Keeping central records of sanctions on a database, without including names, to guide decision-makers.

Practices to support the effective management and oversight of the misconduct action

10.1.4 Agencies may wish to consider the following approaches for the effectiveness of misconduct conduct action and executive oversight of this activity:

- Establish a database of cases, which could be a case management system, to assist consistency in handling cases and sanctions. A database can support quality assurance e.g. the timeliness of cases, and provide data to senior management on the number and types of misconduct cases, the numbers of reviews sought and the outcomes of any such reviews.
- Periodically conduct a file audit of a sample of misconduct files to evaluate if correct procedures and recordkeeping requirements are being followed
- Assess the outcomes of reviews conducted by the Merit Protection Commissioner to identify concerns about the quality of decision-making that may point to systemic issues
- Use agency-specific data from the annual APS Employee Census, or include questions, in a pulse or short, regular surveys, to establish the level of employee knowledge about misconduct.[47]
    - For example, questions could be asked about how to report misconduct, including as a disclosure under the *Public Interest Disclosure Act 2013* (PID Act), confidence in being protected from victimisation and discrimination if misconduct is reported, whether or not serious misconduct, including corruption has been observed in the last 12 months, and views on whether colleagues and managers behave in accordance with the Code.
- Regular reports to the agency executive on trends, or any systemic issues arising from misconduct and other integrity casework.

[47] An agency seeking advice on the APS Employee Census or conducting surveys related to the Census can email research@apsc.gov.au.

Educating employees

10.1.5 It is good practice for agencies to conduct periodic training on the relevance of the APS Values and the Code to employees' day-to-day work, including the use of scenarios relevant to the work of the agency. This training could also include information on the options for reporting misconduct within the agency

10.1.6 Case studies are useful for informing and educating employees about appropriate standards or behaviour, risks in the agency's operational environment and the consequences of misconduct, including sanctions. Such case studies can be published and have a significant educative effect.

10.1.7 Agencies should take reasonable steps to de-identify material to ensure that a person's identity cannot be 'reasonably ascertained' from the case study.[48]Withholding a person's name may not be sufficient. For example, in the right circumstances information about an employee's work area or the type of complaint may be sufficient to identify that person.

10.1.8 The risk that the use and disclosure of personal information in this way would be contrary to the Australian Privacy Principles (APPs) in the *Privacy Act 1988* is reduced if the affected employee has been made aware of this possibility at the time the information is collected. The employee can be made aware either through generally available information to all staff or through collection notices provided to the employee at the time of the investigation.

10.1.9 The Office of the Information Commissioner has guidelines on the Australian Privacy Principles (APPs), including APP 6.2(a) the use of personal information for a secondary purpose related to the primary purpose of collection.

10.1.10 Alternatively, agencies can amalgamate cases or use 'dummy' facts for the purpose of constructing case studies for training or educative purposes. Case summaries prepared by the Merit Protection Commissioner may be a useful resource—see http://meritprotectioncommission.gov.au/mpc-resources/summaries-of-cases. Additionally, the Fair Work Commission publishes reviews of termination of employment decisions—see www.fwc.gov.au.

10.2 Providing information to a complainant about the outcome of a Code of Conduct investigation

10.2.1 The Australian Public Service Commission (the Commission) has issued guidance on providing information about the outcome of complaints of misconduct at

[48] Personal information can include any information or opinion from which a person's identity is apparent or can be 'reasonably ascertained'. See also Part I, Section 2.3 *Managing misconduct action consistent with the privacy requirements* of this guide.

www.apsc.gov.au/publications-and-media/circulars-and-advices/2008/circular-20083. This is advice is currently being reviewed. The revised information will be added to this guide as an appendix and agencies are advised to contact the Commission's Ethics Advisory Service on 02 6202 3747 or ethics@apsc.gov.au if they are in doubt about the currency of guidance on this topic.

10.3 Key points for agency guidance material

10.3.1 Agency guidance material could include information drawn from this section on the following matters:

- good practice quality assurance mechanisms, including:
    - practices to support quality decision-making
    - practices to support the effective management and oversight of the misconduct action
- periodic education of employees on the relevance of the Code to employees' day- to-day work and on the options for reporting misconduct within the agency
- the information provided to a complainant about the outcome of a Code investigation.

10.3.2 Agencies may also wish to consider developing templates, checklists and sample letters in accordance with agency misconduct procedures and other related policies. These will assist investigators and decision-makers to address more quickly the administrative and procedural fairness issues and provide a consistent approach across the agency.[49]

[49] Agencies may also wish to refer to the Administrative Review Councils Best Practice Guides in relation to administrative decision-making at www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx

APPENDIX 1

Statutory officer holders and the Australian Public Service Code of Conduct

1.1 Introduction

1.1.1 The following explains the provisions in the *Public Service Act 1999* (PS Act) and the *Public Service Regulations 1999* (PS Regulations) relating to certain statutory office holders and the Australian Public Service (APS) Code of Conduct (the Code). In broad terms, the Code applies to statutory office holders who are not agency heads, where they supervise APS employees or have a day to day working relationship with APS employees.

1.1.2 The Code applies to certain statutory office holders who are not excluded from the provision,[50] to the extent that they are engaging with APS employees as managers or colleagues. This means, for example, that statutory office holders working with APS employees are required to meet the same standards of respect and courtesy as APS managers and employees in their dealings with APS employees.

1.1.3 The arrangements preserve the independence of statutory office holders. The PS Regulations provide that in the event of a conflict between the requirements of the Code and the legislation under which the statutory office holder performs their statutory functions, the latter takes precedence.

1.1.4 The Australian Public Service Commissioner (the Commissioner) has a function of inquiring into allegations of breaches of the Code by statutory office holders. While the Commissioner is able to determine that a statutory office holder has breached the Code, the Commissioner is unable to impose a sanction.

1.2 Legislative framework

1.2.1 Section 14 of the PS Act provides that statutory office holders are bound by the Code to the extent prescribed by the PS Regulations. Regulation 2.2 of the PS Regulation details the statutory office holders to whom the Code does and does not apply.

Statutory office holders bound by the Code

1.2.2 The Code applies to statutory office holders who are:

- engaged, employed, or appointed under an Act, and

[50] Regulation 2.2 of the PS Regulations excludes certain statutory office holders from coverage of the Code.

- assisted by, or have dealings with APS employees, in a supervisory capacity, or in another capacity related to the office holder's day-to-day working relationship with APS employees.

1.2.3 In this context, a statutory office holder having a 'day-to-day working relationship' with APS employees refers to circumstances in which an office holder and APS employees work together as colleagues or where the statutory office holder otherwise comes into contact with APS employees on a day-to-day working basis. An APS employee does not have to be in the same agency as the statutory office holder for the Code to apply.

Statutory office holders not bound by the Code

1.2.4 Regulation 2.2 of the PS Regulations excludes agency heads, judicial officers, members of the Defence Force and certain tribunal members listed in regulation 2.2(2)(c) of the PS Regulations from the statutory office holders covered by the Code.

Code does not apply if inconsistent with statutory functions

1.2.5 There may be times when the requirements of the Code, including the requirement to uphold the APS Values and Employment Principles, may not be consistent with a statutory office holder's functions, or may have the effect of compromising their statutory independence. In these circumstances, it is expected that the statutory office holder will adhere to the requirements of their primary legislation, rather than the Code. PS Regulation 2.2 provides that if there is an inconsistency between the requirements of the Code and another law relating to the statutory office holder's office or appointment, the statutory office holder's own legislation will take precedence.

1.3 Managing suspected of misconduct by statutory office holders

1.3.1 The legislation under which statutory office holders are appointed or hold office will usually contain provisions relating to the circumstances in which a statutory office holder may be removed from office. Some legislation includes provisions for disciplinary arrangements that are separate from the arrangements in s14 of the PS Act.

1.3.2 For the purposes of the arrangements established under s14 of the PS Act, the Commissioner has the function of inquiring into suspected breaches of the Code by statutory office holders, and determining whether or not the statutory office holder has breached the Code (regulation 6.1A of the PS Regulations).

1.3.3 Where it is suspected that a statutory office holder covered by the Code may have breached the Code in relation to their treatment of an APS employee, it is advisable to discuss the matter with the Australian Public Service Commission.

APPENDIX 2

Example of agency procedures under section 15(3) of the Public Service Act 1999

I, [*name of agency head*], acting in my capacity as [*position and name of agency*], establish these procedures under subsection 15(3) of the *Public Service Act 1999* ('the Act').

These procedures commence on [*date of commencement*].

[*Signature of agency head*]

1. Application of procedures

1.1 These procedures apply in determining whether a person who is an Australian Public Service (APS) employee in the [*name of agency*], or who is a former APS employee who was employed in the [*name of agency*] at the time of the suspected misconduct, has breached the APS Code of Conduct ('the Code') in section 13 of the Act.

1.2 These procedures also apply in determining any sanction to be imposed on an APS employee in the [*name of agency*] who has been found to have breached the Code.

1.3 These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except where a decision had been made, before [*date of commencement*], to begin an investigation to determine whether there had been a breach of the Code.

1.4 These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after [*date of commencement*].

1.5 In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the Act in connection with their engagement as an APS employee.

2. Availability of procedures

2.1 As provided for in subsection 15(7) of the Act, these procedures are publicly available on the [*name of agency*] website [*or as otherwise made publicly available*].

3. Breach decision-maker and sanction delegate

3.1 As soon as practicable after a suspected breach of the Code has been identified and the [*name of agency head*], or a person authorised by the [*name of agency head*], has decided to deal with the suspected breach under these procedures, the [*name of agency head*] or that

person will appoint a decision-maker ('the breach decision-maker') to make a determination under these procedures.

3.2 The role of the breach decision-maker is to determine in writing whether a breach of the Code has occurred.

3.3 The breach decision-maker may undertake the investigation, or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make a report of recommended factual findings to the breach decision-maker.

3.4 The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code ('the sanction delegate')will be a person holding a delegation of the powers under the Act to impose sanctions.

3.5 These procedures do not prevent the breach decision-maker from being the sanction delegate in the same matter.

4. Person or persons making breach determination and imposing any sanction to be independent and unbiased

4.1 The breach decision-maker and the sanction delegate must be, and must appear to be, independent and unbiased.

4.2 The breach decision-maker and the sanction delegate must advise the *[name of agency head or the person authorised by the agency head to appoint the breach decision-maker*] in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased; for example, if they are a witness in the matter.

5. The determination process

5.1 The process for determining whether a person who is, or was, an APS employee in the [*name of agency*] has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.

5.2 The process must be consistent with the principles of procedural fairness.

5.3 A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to

a) inform the person of:

i. the details of the suspected breach of the Code, including any subsequent variation of those details; and
ii. where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act; and

b) give the person a reasonable opportunity to make a statement in relation to the suspected breach.

5.4 The statement may be a written or oral statement and should be provided within [*number of days—generally this would be 7 calendar days*] or any longer period that is allowed by the decision-maker.

5.5 A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.

5.6 For the purpose of determining whether a person who is, or was, an APS employee in the [*name of agency*] has breached the Code, a formal hearing is not required.

6. Sanctions

6.1 The process for imposing a sanction must be consistent with the principles of procedural fairness.

6.2 If a determination is made that an APS employee in the [*name of agency*] has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to

a) inform the employee of:

   i. the determination that has been made; and
   ii. the sanction or sanctions that are under consideration; and
   iii. the factors that are under consideration in determining any sanction to be imposed; and

b) give the employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration.

6.3 The statement may be a written or oral statement and should be provided within [*number of days—generally this would be 7 calendar days*] or any longer period that is allowed by the sanction delegate.

7. Record of determination and sanction

7.1 If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the [*name of agency*], a written record must be made of

a) the suspected breach; and
b) the determination; and
c) any sanctions imposed as a result of a determination that the employee has breached the Code; and

d) if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of an employee, regarding the sanction decision, that statement of reasons or those statements of reasons.

APPENDIX 3

Interaction between the Australian Public Service Code of Conduct and the Public Interest Disclosure Act

1. Introduction

1.1 On 15 January 2014 the *Public Interest Disclosure Act 2013* (PID Act) came into effect, repealing the whistleblower scheme that had previously existed under the *Public Service Act 1999* and introducing a new framework for the making of public interest disclosures across the Commonwealth public sector.

1.2 This appendix provides information on the connection between the PID Act and the Australian Public Service (APS) misconduct framework in relation to internal disclosures made by public officials about the conduct of APS employees. Information on the general operation of the PID scheme, including on external, emergency and legal practitioner disclosures can be found on the Commonwealth Ombudsman's website www.pid.ombudsman.gov.au or by contacting the Ombudsman at s 47F @ombudsman.gov.au.

1.3 The Commonwealth Ombudsman, and the Inspector-General of Intelligence and Security (IGIS) in respect of intelligence agencies, oversee the PID Scheme. The Commonwealth Ombudsman has issued *Information for Agencies* [51] explaining how the PID Act works, setting out the Commonwealth Ombudsman's statutory obligations, and suggesting best practice in handling public interest disclosures.

1.4 The PID Act creates a framework for facilitating the disclosure of suspected wrongdoing in the Commonwealth public sector, for protecting disclosers from adverse consequences of making a disclosure, and for timely and effective investigation of disclosures of suspected wrongdoing.

2. Internal disclosures that may also be allegations of breaches of the APS Code of Conduct

2.1 Disclosable conduct is defined in s29 of the PID Act to cover a broad range of inappropriate conduct within the Commonwealth public sector, including conduct that is contrary to law, or could otherwise give reasonable grounds for disciplinary action. Disclosures could therefore contain material that alleges a breach of the APS Code of Conduct (the Code) by an APS employee or employees.

[51] http://www.ombudsman.gov.au/about/making-a-disclosure/information-for-agencies

2.2 Internal disclosures are those made in accordance with the PID Act to an appropriate 'authorised officer' in a Commonwealth agency. A current or former public official can make an internal disclosure to an authorised officer within their agency or the last agency in which they were employed. A current public official may also make a disclosure under the PID Act to their supervisor, who is then obliged to pass it on to an authorised officer in their agency. If a public official wishes to make an internal disclosure about the conduct of an employee in a different agency, it can be made to an authorised officer in that employee's agency.[52] The Commonwealth Ombudsman and the IGIS may also receive disclosures about the conduct of officials in other agencies within their respective jurisdictions.

2.3 Once an authorised officer receives a disclosure under the PID Act, they must notify the principal officer of the disclosed information. For APS agencies the 'principal officer' is the agency head. When a public interest disclosure alleges a breach of the Code, the agency head[53] will need to manage the disclosure under the terms of the PID Act in the first instance.

2.4 Under that Act, unless there are grounds not to investigate, the agency head must investigate the disclosure. The agency head may:

- conduct an investigation in accordance with that agency's s15(3) procedures and simultaneously investigate the disclosure under the terms of the PID Act, or
- consistent with sections 47(3) and 51 of the PID Act, decide whether or not it would be appropriate to deal with the matters raised by the disclosure as a suspected breach of the Code in accordance with the agency's s15(3) procedures.

3. Investigations of allegations of breaches of the Code under the PID Act

3.1 Disclosures under the PID Act that allege a breach of the Code must be considered in accordance with the PID Act.

3.2 It is open to agencies to carry out an investigation simultaneously under their s15(3) procedures and the PID Act. Where this option is chosen, agencies will need to exercise great care to ensure that they meet all of their obligations under both the PID Act and their s15(3) procedures. A failure to do so may lead to an invalid determination by the breach decision-maker.

3.3 Alternatively, an agency may choose to conduct a PID investigation separately. At the conclusion of that investigation, which may be of relatively short duration and

[52] If the disclosure relates to conduct in another agency, in whole or in part, the disclosure may be allocated to that agency for handling (see ss43 to 45 of the PID Act).
[53] Under s77 of the PID Act, an agency head who is a principal officer for the purposes of the PID Act can delegate any of his or her powers under that Act to a public official who belongs to their agency.

focus on whether there is sufficient substance to the allegation to merit investigation as a suspected breach of the Code under their agency's s15(3) procedures, the agency head is required to prepare a report as required under s51 of the PID Act.

3.4 The PID investigation report could include a recommendation, or a decision, where appropriate, as to whether or not a Code investigation is to be conducted under the agency's s15(3) procedures. A 'decision' rather than a 'recommendation' may be more likely to assure the person making the disclosure that their disclosure has been considered and dealt with appropriately. The person making that decision must be authorised to do so consistent with that agency's procedures. If the agency head decides that further inquiry in accordance with the agency's s15(3) procedures is not appropriate, then he or she needs to record the reasons for reaching this conclusion and their recommendation or decision as to what other action, if any, would be appropriate.

3.5 A copy of the report made under s51 of the PID Act must be given to the discloser. Section 51 sets out provisions relating to providing that report and the limits on material that may be included as part of the report given to the discloser.

3.6 An investigation under an agency's s15(3) procedures is a discrete and separate investigation, not a continuation of the PID investigation.

Discretion not to investigate or investigate further under the PID Act

3.7 The agency head may decide not to investigate a disclosure or, if the investigation has started, not to investigate the disclosure further, for any of the reasons listed in s48 of the PID Act. This includes where an investigation into the same, or substantially the same, disclosable conduct is already underway or has been concluded under the agency's s15(3) procedures (see ss48(1)(f) and (g) of the PID Act).

3.8 The agency head is required to notify the discloser of the decision not to investigate, or investigate further, and to provide reasons for the decision (ss48, 50(1) and 50(3) of the PID Act). These reasons could include, for example, that the matters that form the subject of the disclosure are being investigated, or have been investigated, as a suspected breach of the Code under the agency's s15(3) procedures.

4. Protection of disclosers including confidentiality

4.1 A person who makes a public interest disclosure covered by the PID Act has immunities from legal liability and protection from reprisals.[54] The discloser's identity has special protection under s 20 of the PID Act. These protections will continue to apply to the discloser where an investigation under an agency's s15(3) procedures arises from a PID disclosure.

[54] See ss9 to 24 of the PID Act

4.2 It is an offence to disclose information obtained in the course of a PID investigation, or in connection with the performance of a function under the PID Act unless the information is used for the purposes of the PID Act or taking action in response to a disclosure investigation. Such an offence could result in imprisonment and/or a fine.[55] While an investigation conducted under an agency's s15(3) procedures following a decision or recommendation of a PID investigation is an action taken in response to a disclosure investigation, agencies will need to consider carefully the disclosure of information obtained in the course of the PID investigation.

4.3 Agency heads will need to ensure appropriate arrangements are in place to protect the identity of the discloser and to protect them from reprisals for making the disclosure. To assist agencies, the Commonwealth Ombudsman's *Agency Guide to the Public Interest Disclosure Act 2013* includes information on supporting and protecting the discloser. Chapter 6 of that guide is particularly relevant.

4.4 It may be necessary to reveal the identity of a complainant (including a person who has made a disclosure under the PID Act) or a witness in conducting a misconduct investigation for procedural fairness reasons. Even where the agency adopts measures to avoid revealing identities of complainants and witnesses during the course of its own inquiry, the identities may be revealed on review by the Merit Protection Commissioner, the Fair Work Commission, in related criminal proceedings, or in the context of a legal challenge to the decision. It is appropriate for agencies to let disclosers and witnesses know that while their identities will be kept confidential so far as the law allows, they may be revealed during the investigation or subsequently. In that context, it may be useful to provide advice on the arrangements in place to protect the discloser and witnesses from possible reprisals in the event that identities are disclosed.

[55] See ss65(1) and (2) of the PID Act

APPENDIX 4

The Australian Public Service Code of Conduct and the Public Governance, Performance and Accountability Act

1. Introduction

1.1 The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) is the primary piece of legislation governing financial resource management in the Commonwealth. The PGPA Act supports the efficient, effective, economical and ethical use of Commonwealth resources and is administered within the Finance portfolio. More information about the PGPA Act can be found on the Department of Finance website.

1.2 This appendix provides information on the connection between the PGPA Act, particularly the duties of officials, and the Australian Public Service Code of Conduct (the Code).

2. General duties of officials and the Code of Conduct

2.1 Sections 25 to 29 of the PGPA Act set out the following general duties of officials:

- to act with care and diligence
- to act honestly, in good faith and for a proper purpose
- to not use their official position or information improperly, including to obtain a benefit or cause harm
- to disclose material personal interests.

2.2 These duties are similar to elements of the Code. Generally, if an employee upholds the Code they will also be complying with the general duties of officials. Appendix 5 *Elements of the Australian Public Service Code of Conduct* provides more information on the connection between the Code and relevant sections of the PGPA Act. Further information on the general duties of officials can be found in the Department of Finance Resource Management Guide No. 203 *General duties of officials.*[56]

3. Comparison of the Code of Conduct and the PGPA Act

3.3 Below is a table comparing relevant elements of the Code with the general duties of officials in the PGPA Act.

PGPA Act	Code of Conduct

[56] www.finance.gov.au/resource-management/accountability/officials

Section 25 Duty of care and diligence (1) An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person: (a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official. (2) The rules may prescribe circumstances in which the requirements of subsection (1) are taken to be met.	**Section 13(2)** An APS employee must act with care and diligence in connection with APS employment
Section 26 Duty to act honestly, in good faith and for proper purpose An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose.	**Section 13(1)** An APS employee must behave honestly and with integrity in connection with APS employment **Section 13(8)** An APS employee must use Commonwealth resources in a proper manner and for a proper purpose
Section 27 Duty in relation to use of position An official of a Commonwealth entity must not improperly use his or her position: (a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or (b) to cause, or seek to cause, detriment to the entity, the Commonwealth or any other person.	**Section 13(10)** An APS employee must not improperly use inside information or the employee's duties, status, power or authority: (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or (b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.

Section 28 Duty in relation to use of information A person who obtains information because they are an official of a Commonwealth entity must not improperly use the information: (a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or (b) to cause, or seek to cause, detriment to the Commonwealth entity, the Commonwealth or any other person.	**Section 13(10)** An APS employee must not improperly use inside information or the employee's duties, status, power or authority: (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or (b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
Section 29 Duty to disclose interests (1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest. (2) The rules may do the following (a) prescribe circumstances in which subsection (1) does not apply; (b) prescribe how and when an interest must be disclosed; (c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).	**Section 13(7)** An APS employee must: (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.

4. Transitional matters

4.1 The PGPA came into effect on 1 July 2014. The *Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014* amended both the PGPA Act, before it came into effect, and the *Public Service Act 1999* (PS Act) to align the relevant elements of the Code and the duties of officials. Transitional provisions provide that

i. For the purposes of s13(7) of the PS Act, the obligation to disclose a material personal interest, and to take reasonable steps to avoid any real or apparent conflict of interest, will apply regardless of whether that interest, or that conflict of interest, arose before or after commencement.

ii. For the purposes of s13(8) of the PS Act, the obligation to use Commonwealth resources for a proper purpose applies to uses of resources after commencement.

iii. The amendments to s13(10) of the PS Act, apply to

   a. uses by APS employees occurring after commencement of information obtained before and after commencement and

   b. uses by APS employees of their duties, status, power or authority after commencement.

4.2 Whether an employee has breached the Code or not will be determined having regard to the requirements of the Code at the time of the suspected act of misconduct.

APPENDIX 5

Elements of the APS Code of Conduct

1.1 Introduction

1.1.1 This appendix provides guidance on the elements of the Australian Public Service (APS) Code of Conduct (the Code). It has been developed to assist decision-makers, and others involved in handling misconduct matters, better understand the application of the Code.

1.1.2 The Code in s13 of the *Public Service Act 1999* (PS Act) has 13 subsections, or elements, some of which contain several obligations. For example, s13(3) requires APS employees, when acting in connection with APS employment, to treat everyone with respect and courtesy, and without harassment.

1.1.3 When interpreting the Code, as a general rule each obligation in the Code is given its ordinary meaning. Decision-makers may rely on authorities such as the Macquarie Dictionary for definitions.

1.1.4 Further advice on the application of the Code is provided in Part I Section 3.5 of this guide. This includes, in particular, the meaning of the terms '*in connection with*' and '*at all times'.*

1.1.5 Other publications also provide information on the Code including:

a) the *APS Values and Code in practice*.[57]
b) Part 2 of the *Australian Public Service Commissioner's Directions 2016* (the Directions) provides information on the application and scope of the Values.

1.2 Standard

1.2.1 The standard of behaviour expected of APS employees is an objective one:

> *The propriety of the actions expected of an employee should be assessed by reference to the standard of conduct expected of a public servant, having regard principally to the expectations of the public.*[58]

1.2.2 The question of whether particular conduct breached the Code is not determined by the subjective standard of the particular employee. The fact that an employee genuinely believed

[57] http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct
[58] *Bercove v Hermes* (1983) 74 FLR 315

that the action he or she took was proper is not relevant to the decision about whether that action was in breach of the Code. For example, an employee may genuinely believe that he or she was justified in using defamatory and hurtful language about a colleague, but such behaviour may not meet the objective standard of respect and courtesy in the Code.

1.3 Intent or motive

1.3.1 A determination that a person has breached the Code does not generally require intent. A person being investigated for misconduct may still be found to have breached the Code if they, for example, acted without care or without diligence, whether or not they meant to. The Code does not use words such as 'wilful' or 'reckless' or 'negligent' to qualify the behaviour involved. Proven behaviour contrary to the particular section of the Code may suffice as evidence of a breach of the Code. Generally, it not necessary to establish motive or personal gain to find a breach of the Code.

1.3.2 There are some exceptions. These are set out later in this appendix.

1.3.3 While intent, motive, or personal gain may not be required to establish a breach of the Code, they may be considered when deciding whether to investigate a matter under an agency's s 15(3) procedures or making a decision about sanction. For example, knowingly acting in breach of the Code would generally be considered more serious than a one-off careless act.

1.4 Multiple obligations

1.4.1 Some elements of the Code contain several obligations. For example, s13(1) of the PS Act requires APS employees to behave honestly **and** with integrity, in connection with APS employment. An employee is required to uphold all obligations of each element of the Code to comply with the Code.

1.4.2 In such cases, it is not necessary to find that an employee breached every obligation within an element in order to make a determination that the Code has been breached. For example, an employee can be found to have failed to have behaved with integrity, and therefore been in breach of s13(1), without also being found to have behaved without honesty. This applies to other elements of the Code with multiple obligations; care and diligence, respect and courtesy and without harassment etc.[59]

1.4.3 Section 13(11) requires APS employees at all times to uphold the Values and the Employment Principles. A failure by an APS employee to uphold any single obligation of the Values and Employment Principles may also be a breach of the Code.

[59] See *Rothfield v Australian Bureau of Statistics* [PR 927240] AIRC (3 February 2003) where Senior Deputy President Lacy held that the provisions in s13(3) should be read disjunctively.

1.5 Overlapping concepts

1.5.1 There is some overlap between different elements of the Code and between obligations in the same section of the Code. For example, not taking reasonable steps to avoid a conflict of interest could also be a lack of care and diligence. Behaving dishonestly may also be a lack of integrity.

1.5.2 It is generally unnecessary to determine the degree of overlap; a breach of one obligation is a breach of the Code.

1.5.3 Where multiple elements are in play it is appropriate to consider the allegation against each element separately to the extent needed. A breach of one element does not necessarily say anything about the other(s). For example, the fact that a person acts without care and diligence does not mean they cannot have acted with integrity.

2. Section 13—guidance on the scope or application of the elements of the Code

13(1) An APS employee must behave honestly and with integrity in connection with APS employment

2.1 Behaving honestly and with integrity involves concepts such as 'truthfulness', 'sincerity' and 'frankness'. Integrity involves a 'soundness of moral principle and character'.[60]

2.2 Failure to act honestly includes deliberate behaviour that the employee knows to be wrong. However, employees may make honest mistakes without breaching this element of the Code. Such action will usually be better dealt with through performance management such as training or counselling. In more serious cases, it may be dealt with as a potential breach of s13(2) of the PS Act.

2.3 This element of the Code aligns with the duties in s26 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Adherence to the Code will ordinarily meet the requirements of s26 of the PGPA Act.

13(2) An APS employee must act with care and diligence in connection with APS employment

[60] Macquarie Concise Dictionary

2.4 Care and diligence have their ordinary dictionary meanings of 'serious attention and solicitude to work' and 'earnest effort to accomplish what is undertaken'.[61] The standard of care and diligence required is objective and can be assessed by applying the standard of a 'reasonable person' in the same circumstances as the APS employee. The level of care and diligence required of senior managers responsible for the delivery of a program of work may be higher than that of other employees delivering single elements of that program.

2.5 Things done carelessly or without appropriate attention, i.e. without diligence, might be dealt with as a performance issue, through training, or counselling but might also be dealt with as a breach of the Code, particularly for more serious examples. The relevant decision-maker will need to decide which option best meets the circumstances—see *Relationship between misconduct and performance management processes* in Part II, Section 5.1 of this guide.

2.6 Once it has been decided that a Code investigation is warranted, the breach decision-maker can then consider whether the conduct was careless or lacked diligence. It is not, however, enough for the breach decision-maker merely to come to a view that it would have been preferable to deal with the matter in question differently. A difference of opinion on how a matter should have been handled does not necessarily mean that the matter was handled without appropriate care or diligence. The question will be what a reasonably careful and diligent employee in the same position should have done in all the relevant circumstances. This may include, for example, a consideration of whether the employee's conduct was consistent with any professional standards that might apply in that role in addition to those under the Code and Values.

2.7 In some cases, the personal attributes of the employee may be relevant to whether they have acted with care and diligence. For example:

a. an employee who has received training in a specialist skill may be expected to exercise those skills. A person who was known not to have those skills could not reasonably be expected to exercise them;

b. an employee with many years' of relevant experience might reasonably be expected to discharge their duties more effectively than an employee who had no previous directly relevant experience.

2.8 This element of the Code aligns broadly with the duty of care and diligence under s25 of the PGPA Act. Adherence to the Code will ordinarily meet the requirements of s25 of the PGPA Act.

[61] Macquarie Concise Dictionary

13(3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment

2.9 There are three obligations within this section of the Code—respect, courtesy and no harassment.

2.10 The Values also require APS employees to be respectful. Having regard to the employee's duties and responsibilities, employees are expected to respect all people, including their rights and their heritage. Further information on the application of this Value can be found in section 15 of the Directions.

2.11 The requirement to treat everyone with respect and courtesy, and without harassment, is an objective one. The subjective opinion of the person alleging disrespect, discourtesy, bullying or harassing behaviour does not establish the fact of behaviour in breach of s13(3). Similarly, a breach of the element does not require that the relevant employee be offended by the behaviour, or even aware of it. The question is whether a reasonable person observing the behaviour would consider that the behaviour in question met the standard of the Code.

2.12 The use of the word 'treat' does not require direct communication with, or that the behaviour is directed at, a particular person. There are definitions of the word 'treat' that are less direct—'to deal with in speech' is one.

2.13 It may be necessary to consider patterns and overall behaviour when looking at allegations of bullying and/or harassment. Individual actions may not appear to be very significant but, taken in conjunction with other actions, might reveal a pattern of bullying or harassing behaviour.

2.14 Care should be taken with general allegations of bullying and harassment, such as vague claims of 'passive aggressive' behaviour or feelings of being undermined. Allegations of this sort may be a description of the complainant's subjective response to the person they are complaining about. For a breach of the Code to be determined, it is necessary to identify specific incidents and events that can be objectively assessed. In addition, a lack of such specificity in allegations of misconduct will make it more difficult to ensure that the person who is the subject of those allegations is able to respond to them in a fair and meaningful way. If an agency is taking into consideration a pattern of behaviour, that pattern of behaviour has to be linked to observable incidents that are capable of being proven as misconduct.

13(4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws.

2.15 This element of the Code will most commonly arise in agencies where the work is governed by legislation, or will involve broader laws such as work, health and safety legislation, financial legislation, and the criminal law. For the purposes of s13(4), Australian laws include any Commonwealth, State or Territory legislation and any instruments made under such legislation.

2.16 Not all Australian laws will be relevant for the purpose of s13(4). Only those laws which establish a particular standard of individual conduct will be relevant. For example, a law which requires a corporation to submit a tax return is not a law that an individual person can breach. By contrast, a law requiring an individual to lodge a tax return is a law which imposes a particular standard of conduct on individuals.

2.17 Some of the applicable laws, for the purposes of s13(4), are criminal laws. A person who has breached a law which is a criminal law can be tried by a court and found guilty of a criminal offence. Only a court can make a decision that a person is guilty of a criminal offence. However, this does not prevent a breach decision-maker in an agency from making a finding that a person has not complied with a criminal offence provision.

2.18 In these circumstances, a breach decision-maker is not making a finding of criminal guilt and is not bound by the laws relating to evidence. Further, the burden of proof on a breach decision-maker is generally that he or she be satisfied 'on the balance of probabilities'. In a criminal prosecution, the burden of proof must generally be discharged 'beyond reasonable doubt'.

2.19 The specific offence provision will generally define the physical and fault elements of an offence, such as whether there was the necessary level of intent. The breach decision-maker will need to satisfy himself or herself about the employee's conduct in that context. In cases of doubt, agencies are encouraged to seek legal advice.

2.20 Care should be exercised before deciding to investigate an APS employee for suspected breach of this element of the Code. The fact that a person has been charged with a criminal offence and is awaiting trial does not prevent an agency from investigating an employee for breach of this element. However, there may be circumstances where the investigation may prejudice the outcome of criminal proceedings.[62]

2.21 Where a court has recorded a conviction or otherwise determined criminal guilt a breach decision-maker can have regard to this in determining whether the employee breached s 13(4). Equally, the fact that a person has been convicted of a criminal offence does not mean that the person is automatically in breach of s13(4). A decision-maker proposing to take into account a criminal conviction must provide the individual with a reasonable opportunity to comment before doing so.

[62] see section 3.7.9 of this guide for more information about this issue

13(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction

2.22 This element of the Code contains a number of limbs in relation to the giving of a direction, all of which must be met before a breach of the element can be determined.

Clarity of the direction

2.23 A direction needs to be 'tightly drafted, using the language of command throughout, and specify exactly what actions should and should not be taken'.[63] A direction also needs to be internally consistent. It is appropriate to use language that is clear and directive and that provides the employee with no discretion in relation to their behaviour.

2.24 A general policy or guideline is not a direction for the purposes of the Code. Where a policy document is intended to be a direction from an agency head the document should be written using the language of command and to specify that it is a direction for the purposes of the PS Act.

2.25 A direction also needs to be clear in its terms and capable of being complied with. A direction to 'behave appropriately', for example, may be difficult to comply with and enforce as it is not clear what is meant by the term.

Reasonableness of the direction

2.26 The direction must be both lawful and reasonable. Whether it is reasonable will depend upon all the circumstances.

2.27 A reasonable direction has been described as one with the object of 'securing proper values to be required of a public servant…and in particular, the maintenance of public confidence in the integrity of the public service and public servants'.[64] A reasonable direction needs to be proportionate to the end to be achieved.

2.28 Using that test, directions concerning private behaviour may be reasonable, but the circumstances would be critical. For example, directing an employee not to contact a co-worker at work and outside work, including using private telephone or email or social media, may be reasonable to protect that other employee's health and safety. Generally, directions aimed at private conduct with no apparent connection with the employee's work would not be reasonable.

[63] *Phillips v DAC* (1994) 48 FCR 57
[64] *McManus v Scott-Charlton* (1996) 140 ALR 625

Authority to give the direction

2.29 While there is no provision of the PS Act that expressly authorises the giving of directions, s13(5) of the PS Act recognises that there is an implied power to give directions.[65] Therefore, a supervisor has implied authority to direct subordinate staff and an employee with functional responsibility for a particular matter generally has implied authority to give directions relevant to that matter. [66]

13(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with a Minister or Minister's member of staff

2.30 APS employees who deal with Ministers or with Ministers' offices may be privy to sensitive information in the course of their employment. APS employees must treat any such dealings with appropriate confidentiality. The phrase 'appropriate confidentiality' allows for disclosure to whomever else within the APS and the Government might have a proper need to know.

2.31 The APSC publication *APS Values and Code in practice: A guide to official conduct for APS employees and agency heads* provides guidance on working with the Government and the Parliament, and on managing official information.

13(7) An APS employee must:

> **a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and**
>
> **b) disclose details of any material personal interest of the employee in connection with the employee's APS employment**

2.32 A conflict of interest, including a material personal interest, can arise out of a work, private or social context. It might arise due to an APS employee's private share holdings, or those of their immediate family, other personal interests, acceptance of a gift, benefit or hospitality, cultural obligations, political activities or personal relationships. It can also arise through outside work—paid or voluntary.

2.33 To be 'material' a personal interest needs to be of a type that can give rise to a real or apparent conflict of interest. Personal interests do not give rise to a conflict of interest unless there is a real or sensible possibility of conflict and not simply a remote or theoretical

[65] It has been held that the source of the power to give a direction is the contract of employment, not statute. Thus the decision to give a direction is not a decision to which the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies: *Bayley v Osborne* (1984) 4 FCR 141 at [33].

[66] The Australian Government Solicitor's Legal briefing Number 104 *Misconduct in the Australian Public Service* provides further information on the scope of a direction and who can give a direction http://www.ags.gov.au/publications/legal-briefing/index.html

possibility of conflict. If no reasonable person could draw a connection between the employee's personal interest and their duties, then the personal interest is not 'material'.

2.34 Once a material personal interest is identified, the employee must disclose that interest. If an employee is in a position to, or perceived to be in a position to, influence an outcome or a decision then that person needs to take reasonable steps to avoid that conflict of interest.

2.35 This element of the Code aligns with the duty to disclose interests under s29 of the PGPA Act. Adherence to the Code and the agency's policy and procedures for disclosing and managing conflicts of interest will ordinarily meet the requirements of s29 of the PGPA Act.

13(8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose

2.36 'Commonwealth resources' is a broad term and includes money, goods, services, vehicles, office equipment, official records, office premises, telephones or other telecommunication devices and computers. It also includes the salary costs of APS employees.

2.37 Most agencies have policies advising their employees on the appropriate use of Commonwealth resources. It is not appropriate for Commonwealth resources to be used for private gain. However, subject to agency policies, it is reasonable for APS employees to have limited private use of office equipment, for example reasonable and necessary telephone or email communication with family. Inappropriate use of an agency's ICT resources at work or out of office hours is covered by this section of the Code.

2.38 Damage to Commonwealth resources, however caused, can come within this section but each case will need to be considered carefully on its merits before deciding that misconduct action is appropriate.

2.39 The PGPA Act also requires APS employees to manage or use public resources in a proper manner. Adherence to the Code will ordinarily meet the requirements of s26 of the PGPA Act.

13(9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment

2.40 APS employees are required to provide responsive, efficient and effective services consistent with the APS Values, Employment Principles and associated Directions. Requests for information for official purposes may be made by members of the public, businesses, members of the media, other jurisdictions—national and international, members of Parliament, other Commonwealth agencies, by the employee's agency or another APS agency, or by work colleagues.

2.41 The information provided by APS employees in connection with their APS employment should not be misleading and should be appropriate to the request being made. An objective consideration of the information given and the circumstances in which it was given is necessary to determine whether the information was misleading. That a person receiving the information was misled does not make the information misleading in and of itself.

2.42 This element of the Code applies to requests for information made for official purposes in connection with an employee's APS employment. This is broader than requests for information that an employee may receive as part of their duties, and includes requests for information that relate to their own employment, such as information relevant to the job, applications for promotion, or to leave applications.

13(10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:

> **a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or**
>
> **b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person**

2.43 A breach of this element could occur if, for example, an APS employee gains, or seeks to gain an advantage for themselves, a friend, family member or associate. It can also occur if a senior officer in a supervisory role uses their status to gain favours from a member of their team or other junior staff. The benefit or advantage is not defined and is not limited to financial gain.

2.44 Whether or not any person actually obtained a benefit from the employee's actions does not determine whether the behaviour is in breach of this element of the Code. This element can be breached if the employee merely sought a benefit or advantage. Similarly, actual detriment to the agency, Commonwealth or other person does not have to have occurred for a breach to be found.

2.45 Inside information could include any official information which is not public. For example, it could include confidential information the employee has access to as a consequence of their employment or information that was provided on the basis that it was to be used only for a specific purpose. There may also be other agency specific legislation limiting the use of information.

2.46 Whether a use is improper, or not, will depend on the circumstances of each case. It is appropriate, generally, to assess the case by considering whether a reasonable person would, having regard to any relevant agency guidance, form the view that the use was improper. Employees of the APS are expected to undertake their duties in the public interest. On that basis, deciding whether a use was improper would have regard to the nature of the benefit or advantage they were attempting to gain, or the detriment they were attempting to cause.

2.47 The phrases 'seek to gain' a benefit and 'seek to cause' detriment indicate that the employee's conduct was intentional. In considering behaviour against this element of the Code, agencies will need to be able to establish that the employee acted with some degree of intention to achieve the gain or cause the detriment.

2.48 This element of the Code aligns with the duty in ss27 and 28 of the PGPA Act of an official not to use their position or information or improper purpose.[67] Adherence to the Code will ordinarily meet the requirements of ss27 and 28 of the PGPA Act.

13(11) An APS employee must at all times behave in a way that upholds:

a) the APS Values and APS Employment Principles; and

b) the integrity and good reputation of the employee's Agency and the APS

2.49 This element of the Code applies to an APS employee's behaviour 'at all times'. It may be breached by an APS employee outside normal work hours and at non-work premises. There is no explicit requirement in the section that the suspected conduct of the employee must be connected to their APS employment. In practice, however, determining that an action breaches the Code will generally require some degree of connection to the employee's employment.

2.50 This element of the Code places a positive obligation on APS employees to behave in a way that maintains confidence in their ability to serve the Government of the day professionally and does not undermine public confidence in their agency or the APS.

2.51 Because this element of the Code places a positive obligation on employees, it is not necessary to establish actual damage to the reputation of the agency or the APS in order to find that this section of the Code has been breached. A lack of damage may be relevant to a decision to start an investigation under an agency's s15(3) procedures or be relevant to mitigation when deciding a sanction.

2.52 Where an agency is alleging that an employee has breached s13(11) of the Code for behaviour that fails to uphold the Values and/or the Employment Principles, it is necessary to identify which Values or Employment Principles are at issue. It also necessary to advise the employee which Values or Employment Principles are at issue, and to give the employee an opportunity to respond, consistent with the agency's s15(3) procedures, prior to making a decision on breach.

2.53 The concept of integrity in this section of the Code is different to integrity in s13(1). Under s13(1), it is necessary to behave *with integrity*; here, an APS employee has to behave

[67] See Department of Finance *Resource Management Guide No. 203 General Duties of Officials* for further information.

in a way that *upholds the integrity* of the employee's agency and the APS. For example, a public servant agreeing with critical comments made by a client about government policy may not be consistent with a requirement to behave in a way that upholds the integrity of their agency and the APS, in the sense of upholding their sound or unimpaired condition, but it may not in itself indicate that the public servant lacks integrity.

2.54 Information on the relationship between private behaviour of a criminal nature and the Code is in Part I, Section 3.7 of this guide *Suspected Misconduct that may also be a criminal act.*

13(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia

2.55 The Code applies to APS employees on duty overseas at all times, encompassing the private behaviour of APS employees overseas. It is recognised that Australia expects the highest levels of professional and ethical behaviour by its representatives overseas. Given that employees serving overseas are particularly visible, inappropriate or unethical conduct in their private lives is likely to reflect negatively on the good reputation of Australia.

2.56 Most agencies with employees overseas have policies that articulate the responsibilities of those employees.[68] If such policies do not exist, it is advisable for agencies to advise staff who travel and work overseas of their obligations under the Code and the agencies' expectations of behaviour.

13(13) An APS employee must comply with any other conduct requirements prescribed by the regulations

2.57 To date, only one other conduct requirement has been prescribed under the *Public Service Regulations 1999* (PS Regulations).

2.58 Regulation 2.1 of the PS Regulations imposes a duty on an APS employee not to disclose certain information without authority. The duty applies to information communicated in confidence or where disclosure could be prejudicial to the effective working of government. Regulation 2.1(5) of the PS Regulations sets out circumstances where APS employees are not prevented from disclosing information.

2.59 The regulation is not designed to regulate the disclosure of official information comprehensively. It operates alongside other provisions and obligations, including agency-level directions and authorisations.

[68] The Department of Foreign Affairs and Trade has established guidelines and a code of conduct in this area that other agencies may wish to adapt to suit their needs—see http://dfat.gov.au/about-us/publications/Pages/dfat-code-of-conduct-for-overseas-service-2.aspx. *APS Values and Code in practice* also provides some guidance.

2.60 This regulation also notes that under s70 of the *Crimes Act 1914* it is an offence for an APS employee to publish or communicate any fact or document which it is the employee's duty not to disclose. Section 70 also applies to former employees.

APPENDIX 6

Australian Public Service Code of Conduct: Tips and traps in selecting external investigators

1. Introduction

1.1 Depending on the circumstances, agencies may find that they require the services of an external investigator to conduct, or assist with, an investigation of suspected misconduct. This could occur, for example, where agencies do not have the resources or expertise to conduct investigations themselves.[69]

1.2 This appendix is designed to assist APS managers and human resource practitioners with selecting and managing the engagement of an external investigator to undertake an investigation of suspected misconduct. This appendix may also assist those who are managing investigations conducted by APS employees.

2. Objective

2.1 The objective of this appendix is to assist agencies in managing these investigations in a way that will produce a good quality outcome and represents value for money for the agency.

2.2 This appendix provides advice on

- the decision-making framework
- the circumstances in which an agency may choose to engage an external investigator
- the role of the external investigator
- identifying and engaging a person with the appropriate skills to conduct the investigation
- specifying what will be required of the external investigator in the contract
- briefing and managing the performance of the external investigator
- deliverables required from an investigator
- investigator training programs
- where to access further information

[69] At the request of the agency head, or the Prime Minister, the Public Service Commissioner may inquire into and determine whether an APS employee, or former employee, has breached the Code in certain circumstances (s41(2)(n) of the PS Act). Similarly, at the request of an agency head the Merit Protection Commissioner may inquire into and determine whether an APS employee, or former employee, has breached the Code in certain circumstances (s50(ca) and s50A of the PS Act).

- details on cooperative agency procurement.

3. Limitations of this appendix

3.1 This appendix is not guidance on contract management. The Department of Finance (Finance) has policy responsibility for procurement. When conducting procurement, agencies must comply with the Commonwealth Procurement Rules (CPRs), and their procurement instructions, and guidelines, and spending approval processes.

3.2 The Australian National Audit Office (ANAO) has produced a better practice guide on developing and managing contracts. The ANAO guide covers the phases of the procurement cycle commencing from the selection of a preferred tenderer or contractor through to managing and ending the contract.[70]

3.3 Further information on applying the procurement framework is also available from each agency's procurement area.

4. Terminology

4.1 In this appendix, the terms 'external investigator', 'investigator' and 'contractor' are used interchangeably to describe private sector contractors engaged by an agency to conduct an investigation of suspected misconduct.

4.2 A reference to an agency's 'misconduct procedures' or 's15(3) procedures' is a reference to the written procedures made by the agency head for the purpose of determining whether an Australian Public Service (APS) employee, or former employee, has breached the APS Code of Conduct (the Code) and for determining sanction. These written procedures are made under s15(3) of the *Public Service Act 1999* (PS Act).

5. When might an agency consider hiring an external investigator?

5.1 An agency may decide to engage an external investigator for various reasons. Such reasons could include the following circumstances.

- Where the agency considers it to be a cost effective way of managing its investigations caseload.
- The agency is small and has limited expertise internally, or cannot commit the internal resources required to conduct an investigation.
- The allegations concern matters that require expertise which is not available in the agency.

[70] https://www.anao.gov.au/work/better-practice-guide/developing-and-managing-contracts-getting-right-outcome-achieving-value

- There is difficulty finding people within the agency to investigate who would be seen to be independent and unbiased.
- Where public confidence in the administration of the agency would be best served by an investigation that is at 'arm's length' from the agency.

5.2 Another option could be to use an employee from another APS agency which would also have the added benefit of assisting in building capability across the APS. Alternatively, for non-Senior Executive Service employees suspected of breaching the Code, and with the relevant employee's agreement, an agency may seek the services of the Merit Protection Commissioner or the Australian Public Service Commissioner to conduct the investigation in certain circumstances.

6. The role of the external investigator

6.1 Depending on the circumstances, an external investigator may be engaged to perform various tasks. The Commission is aware that agencies commonly engage an external investigator to:

- **assist** the breach decision-maker with an investigation into part or all of the suspected misconduct
- conduct an investigation and **make a recommendation** to the agency breach decision-maker about whether a breach has occurred
  - this may include making a recommendation about a sanction to the agency
- conduct an investigation and **determine** whether a breach has occurred
  - this may include making a recommendation about a sanction to the agency
- conduct an investigation, **determine** whether a breach has occurred, and **determine** a sanction if one is required.

6.2 There are advantages and disadvantages with each option. In general, there are significant advantages in separating the investigation from the decision-making process. In particular, if the external investigator's role is limited to assisting with, or conducting, an investigation and making recommendations, this allows the agency decision-maker to ensure that the process is procedurally sound. It also offers the opportunity to correct any procedural errors in the investigation before a decision is made.

6.3 Where the investigator's task is to make a recommendation to the agency decision-maker, this also ensures that the decision-maker is available to answer questions and to explain the reasons for their decision, should the decision be subject to administrative review or legal challenge.

6.4 However, arranging for the investigator to have decision-making powers may avoid double handling of the matter and may save costs and time. It may also be necessary to

provide the investigator with decision-making powers because the outcome needs to be independent of agency decision-makers.

6.5 If an external investigator is tasked with determining whether a person has breached the Code, the agency needs to ensure that the investigator is properly authorised in accordance with the agency's s15(3) procedures.

6.6 Where an agency requires an external investigator to impose a sanction, authority to delegate the statutory power to impose a sanction to an 'outsider' must be obtained from the Australian Public Service Commissioner (the Commissioner) in accordance with s78(8) of the PS Act.[71] The Commissioner considers each request on a case-by-case basis and, before giving consent, takes into account a range factors, including the duties to be performed and the qualifications and skills of the outsider.

7. Key attributes that an investigator should possess

7.1 Decisions made about suspected misconduct are important administrative decisions, both in their impact on the person under investigation and in relation to stakeholder confidence in an agency's employment decisions generally.

7.2 There are some essential skills and capabilities that external investigators engaged to undertake investigations into suspected breaches of the Code need to be able to demonstrate. These will be important in any evaluation of the skills of potential contractors.

7.3 These specific skills and capabilities are

- a good understanding of the APS employment framework, in particular the PS Act and subordinate legislation, and the relevant requirements of the *Fair Work Act 2009*[72]
- expertise in conducting administrative investigations which requires, among other things, the capacity to weigh often conflicting evidence for the purpose of making findings of fact
- a good understanding of administrative decision-making, including the requirements of procedural fairness and the need for balanced, reasonable and fair decisions

[71] See the Australian Public Service Commissioner's guidance *Delegations under the Public Service Act 1999 and subordinate* legislation http://www.apsc.gov.au/publications-and-media/current-publications/delegations

[72] An understanding of the unfair dismissal and adverse actions provisions of the Fair Work Act may be important, depending on the circumstances of any given case. Likewise, an understanding of anti-discrimination law may also be necessary. Training in administrative law is generally offered by law firms.

- a capacity to provide a written report that is evidence-based, demonstrates sound reasoning and sets out the process followed in the investigation and the findings in a logical, clear way[73]
- sound analytical skills, good judgement, interpersonal and strong oral and written communication skills
- sound skills in gathering evidence and conducting interviews.

7.4 The investigator should also have a reasonable understanding of the *Privacy Act 1988* and the *Public Interest Disclosure Act 2013*.

8. Risks arising from engaging the 'wrong' investigator

8.1 There are some obvious risks arising from engaging a contractor who does not have the appropriate capabilities. Examples include:

- The investigator does not comply with the agency's s15(3) procedures for investigating suspected misconduct. This can result in a procedural flaw that may lead to a recommendation from the Merit Protection Commissioner that the breach and/or sanction decision be set aside. A procedural flaw may also lead to the breach and/or sanction decision being set aside by a court.
- The individual under investigation is unable to respond to the case against them appropriately because of inadequacies in the case put to them, resulting in a procedural flaw with the same consequences as above.
- The investigator is engaged to undertake the investigation, but subsequently advises that they had not realised the level of difficulty of the case and withdraws their services while the investigation is underway.
- An investigator that has little expertise in conducting administrative inquiries cannot competently weigh the evidence about the individual's behaviour to make clear findings of fact. This can result in a Merit Protection Commissioner recommendation that the decision be set aside, and/or the decision is set aside by a court.
- Having a decision set aside on review is more than just a 'technical glitch'. It increases the time and resources required to resolve an issue and can influence employee opinion on the fairness and reasonableness of the agency's actions, making it more difficult to enforce appropriate standards of behaviour.

[73] Consistent with the Administrative Review Council's Best Practice Guides, particularly those on 'Evidence, Facts and Findings' and 'Reasons'

9. Engaging the investigator

9.1 Identifying the right investigator, providing clear instructions about their role and responsibilities, and managing their performance throughout the period of the contract is critical to obtaining value for money. Whoever is chosen should be 'fit for purpose'. Particular investigators may suit particular types of cases-investigating a relatively straightforward suspected misuse of credit card is quite different from investigating alleged bullying and harassment.

9.2 After identifying a need for investigator services and determining the scope, risk and estimated cost of the investigation, an agency will need to consider how the investigator services will be obtained from the market.

9.3 The engagement and contract management process for outsourced Code investigations is not different, in its essentials, from the management of other types of contracts. Accordingly, an agency considering engaging a contractor to undertake a Code investigation must comply with the CPRs and the agency's procurement instructions and guidelines, and spending approval processes.

Sourcing investigator services from the market—procurement methods

9.4 The CPRs set out the rules that agencies must comply with when they procure goods and services.[74] The estimated cost of the investigator services will largely determine the procurement method for the agency, those methods being an open tender, prequalified tender or limited tender. A limited tender under the CPRs 'involves an agency approaching one or more potential suppliers to make submissions, where the process does not meet the rules for open tender or prequalified tender'.[75]

Cooperative procurement

9.5 Cooperative procurement enables the use of a procurement contract by more than one agency. Agencies can procure cooperatively by a joint approach to the market and/or where an agency/ies establish a contract or standing offer arrangement that allows other agencies to access.

9.6 If an agency wishes to join an existing contract of another agency, the initial request for services and the contract/deed of standing offer should have already specified potential use by other agencies, i.e. a multi-agency access clause/s.

[74] www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules and www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/accountability-and-transparency/ethics-and-probity/principles.html

[75] www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/cprs-procurement-method.html

9.7 Agencies joining an existing contract should ensure that:

- value for money is achieved
- the goods and services being procured are the same as provided for within the contract
- the terms and conditions of the contract are not being materially altered.[76]

9.8 Smaller agencies may wish to check with their portfolio agencies to see whether cooperative procurement arrangements for investigation services exist which they could access.

9.9 The AusTender[77] search functionality also allows the searching of current cooperative procurement arrangements in APS agencies. Providers listed on the Legal Services Multi-Use List may also offer such services.[78]

9.10 Some agencies have already approached the market and have established a panel for investigation services. Two agencies with these arrangements in place, at the time of writing, are listed at the end of this appendix under *Cooperative Procurement*.

Preliminary discussion before engaging a potential investigator

9.11 If an open tender is not required under the CPRs and is undesirable, then a limited tender may be undertaken. In this case a preliminary discussion with the investigator/s may be suitable. Such discussions should focus on the contractor/s suitability for the role in accordance with evaluation criteria. It provides an opportunity to:

- confirm that the potential investigator has the expertise to investigate the case, given the level of complexity involved
- confirm training undertaken and/or academic qualifications
- undertake additional checks on the potential investigator's suitability, including requesting contact details for referees
- identify any conflicts of interest or concerns about possible bias
- explore the potential investigator's ideas for managing the investigation
- clarify the support that may be required from the agency including, for example, access to administrative support and/or legal advice

[76] www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/cprs-value-for-money.html#cooperative

[77] www.tenders.gov.au

[78] www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesmultiuselistandserviceproviders.aspx

- discuss the preliminary details of a contract, including a statement of requirements to define the services the investigator is expected to deliver, the standard to which they are to deliver it, and associated timelines
    - it is important in having discussions of this sort that the agency does not divulge sensitive and/or confidential information
- establish the basis on which fees are payable, for example, capped costs, hourly rates etc.

9.12 The suggested discussion points above, on skills, experience, the suitability of the investigation methodology and costs, are likely to form the basis of the evaluation criteria for the procurement.[79]

Tip

A judgement needs to be made about the information that is able to be provided to potential contractor/s, given that no contract has been signed and any potential investigator is, therefore, not yet bound by contract provisions concerning confidentiality.

A general outline of the case, the potentially relevant aspects of the Code, an assessment of the complexity of the case, and the likely number of witnesses should serve as an adequate amount of information on which to approach potential contractors.

Generally, information provided about the case should not include any sensitive information, including personal information about the person under investigation or other parties. However, it will be necessary to check that a particular investigator does not have a conflict of interest in undertaking the work and the name of the person(s) under investigation will therefore need to be disclosed at some point.

Referee checking

9.13 Checking with referees is a critical part of evaluating the suitability of contractor/s and testing a potential investigator's claims regarding skills and capabilities before deciding to engage them.

9.14 A referee should be an individual with a good knowledge of the APS misconduct framework and in a position to answer questions on the outcomes of at least one or more previous investigations of suspected misconduct that the investigator has conducted.

[79] Contact details for procurement information is available at www.finance.gov.au/procurement/contact-us.html

9.15 Agencies may also wish to ask a potential investigator for a list of agencies for which they have conducted employment related investigations, including the contact details of the relevant contract managers. This enables the agency to choose who to contact as a referee. A potential investigator should be informed that the agency may approach any number of these agencies for references.

9.16 **Attachment A** to this appendix contains a checklist of suggested questions to ask referees.

Tip

The key to selecting a competent investigator and achieving a good outcome is:

- thorough referee checks
- clear terms of reference for the investigation. See *Terms of Reference for Investigation* below.
- sound contract management undertaken by a contract manager with a good understanding of the legislative framework, including the agency's procedural requirements for conducting a Code investigation and, ideally, with experience in managing or investigating suspected misconduct.

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10. Developing the contract

10.1 Once a decision has been made to engage a contractor to undertake a Code investigation a contract needs to be developed. Advice on the form of the contract and its mandatory terms is usually available from each agency's procurement areas.

10.2 There should be a common understanding between the investigator and the agency about the services to be delivered that is apparent in the contract for services. This will include matters such as:

- the role of the investigator, for example, to make recommendations
- the scope of the investigator's powers, for example, confined to the terms of reference for the investigation which cannot be amended without the agreement of the agency
- the detail of what is to be included in any report to the agency

- the process that will be followed in gathering evidence and reaching a decision, including the processes mandated by the agency's misconduct procedures[80]
- the resources the agency will make available to assist the investigator
  - depending on the nature of the case this could include access to the agency's electronic records, access to legal advice, access to agency subject matter experts, and administrative support
- if travel is required, the arrangements for paying for the travel or reimbursement of costs and at what rate
- how procedural issues will be managed, including, in particular, procedural fairness, privacy and confidentiality
- the agreed time, subject to any unforeseen circumstances, the investigation will take
- how the records generated by the contractor will be dealt with
  - generally speaking the contract should provide that all records should be returned to the agency's custody at the completion of the contract with all copies deleted from the contractor's system
  - the contractor may be permitted, however, to keep a de-identified and de-sensitized version of the work for their records
- a requirement in the contract that the investigator will deliver a report at a standard that satisfies the contract manager and to provide in the contract for the investigator to rework the report, at their own cost, if the contract manager is not satisfied with the standard of the draft report
- where a capped fee is not agreed, the estimated cost of the investigation and the circumstances and processes for approval of additional costs should the investigation require this
- the arrangements that exist for the investigators' professional indemnity insurance - for example, to cover the cost of defending their decision in court. If there is no professional indemnity insurance the contract may provide that the service provider will meet these costs.

11. Terms of reference for the investigation

11.1 The scope of the investigation, in effect its 'terms of reference', will need to settled and provided to the investigator before the investigation starts. The terms of reference should not be too broad or too narrow and needs to be clear. Different formulations can provide very different outcomes in terms of cost and time and therefore need careful consideration. For example, terms of reference that require an examination of 'Jane's behaviour towards Mary

[80] Some agencies specify how parties are to be contacted.

last week' is very different from an examination of 'Jane's behaviour towards Mary' and from 'Jane's behaviour towards Mary at a meeting on [date/time]'.

11.2 It is often helpful to provide the employee under investigation with a copy of the terms of reference for the investigation.

11.3 The contract should be formulated so that if fresh allegations emerge during the investigation revised terms of reference will need to be agreed with the agency.

12. Managing the performance of the investigator

12.1 As with any contract, the performance of the contractor, including whether they are meeting the terms of the contract, needs to be managed. In the case of Code investigations, the contract management role often falls to a human resource practitioner.

12.2 The contract manager should be a person with a good understanding of the legislative framework, including the agency's s15(3) procedures requirements for conducting a Code investigation, and ideally would themselves have experience in managing or investigating suspected breaches of the Code.

12.3 In addition, the contract manager needs to be confident in:

- advising the investigator on the handling of the investigation. If the investigator is a decision-maker care needs to be taken to ensure that any advice given maintains the independence and impartiality of the investigator
- assessing the investigator's performance as the investigation progresses and taking action if there are concerns about the investigator's performance.

12.4 All contract managers should familiarise themselves with this guide, *Handling Misconduct*, and other reference material listed below in the section on *Further information*. Contract managers are also able to obtain advice about good practice in managing Code investigations from the Australian Public Service Commission’s Ethics Advisory Service. The contact details for this service are also in the section on *Further information* below.

12.5 If the contract manager is inexperienced, and doubts arise about the contractor's management of the investigation or procedural issues arise during the investigation, they may need to access expert advice within the agency, for example from the agency's procurement/administrative areas.

12.6 Agencies may wish to consider building the following process stipulations into their contracts with external investigators to provide the contract manager with adequate capacity to guide the investigator.

- Sufficient details of the process to be followed to enable the contract manager to assess that the process the investigator intends to follow conforms with the agency's misconduct

procedures. The amount of detail will vary according to the scope of an agency's misconduct procedures.

- The investigator to clear all key correspondence with the contract manager before dispatch, including, in particular, the notice prepared under the agency's misconduct procedures to advise the employee of the details of the suspected breach of the Code.
- The investigator to report on progress to the contract manager at key milestones, and/or regular intervals, during the investigation.
- The investigator to advise the contract manager of any procedural or other issues that might delay or complicate the investigation. In certain circumstances, it may also be appropriate to require the investigator to clear the handling of these matters with the contract manager. These circumstances include
    - where there are fresh allegations of breaches of the Code that fall outside of the terms of reference
    - where an employee raises medical issues
    - where anyone associated with the process threatens to harm themselves or others.
- The investigator to clear any correspondence to the individual under investigation or witnesses with the contract manager where that correspondence concerns procedural issues, including complaints or concerns about the investigation raised by the individual under investigation and witnesses.
- The investigator to provide the contract manager with a draft report before it is submitted as a final report for procedural matters to be checked; however, care needs to be taken that the independence of the report is not compromised.
- In circumstances where the investigator is asked to determine breach and/or decide sanction, the investigator is to make themselves available to the agency, at their own cost, in the event that questions about the decision are raised on review by the Merit Protection Commissioner or the courts.

12.7 In addition, it may be helpful for the contract manager to review records of interview with the employee under investigation and witnesses as they are completed to check that they are sufficiently thorough and relevant to the matters under investigation.

13. Deliverables required from the investigator

13.1 The key deliverable from the investigation process is an investigation report which includes the investigator's findings, which, depending on the investigator's role, may be preliminary findings, and any recommendations. The documentary and other evidence that was relied upon by the investigator need to be presented in support of the findings and recommendations in the report.

13.2 The report should be clearly written and follow a logical structure.[81] Where the investigator is performing a decision-making role, rather than making recommendations to an agency breach decision-maker, the report should:

- set out the details of the alleged misconduct and summarise how the concerns came to light
- set out the process followed in the investigation to collect evidence and information
- determine what facts need to be established in order for the decision-maker to be able to make a decision, i.e. material questions of fact
- present all the relevant evidence including, in particular, the employee's response to the allegations and to any new or conflicting evidence that was uncovered during the investigation
- set out the investigator's findings of fact and conclusions for each allegation. This may not be the case if the role is simply to make a recommendation to an agency breach decision-maker
- include details of the evidence that the investigator relied on to support findings of fact/conclusions
- include any matters that are disputed and set out the reasons for preferring one account over another
- note any other inconsistencies in the evidence or issues that remain unclarified
- identify any mitigating or aggravating circumstances identified during the investigation. This will be especially relevant if a sanction is to be determined
- express a view on whether the Code has been breached, and refer to the relevant element or elements of the Code in question
- set out reasons why the action or behaviour amounted to a breach of the element or elements of the Code.[82]

Tip

Particular attention needs to be paid to the way the investigator presents the allegation of suspected misconduct in the notice of suspected misconduct and then again in the report.

[81] Agencies are encouraged to refer to the Administrative Review Council Best Practice Guides on 'Evidence, Facts and Findings' and 'Reasons' for guidance on this element of administrative decision-making.
[82] Ibid

In the course of a misconduct investigation it will be important to make findings of fact about the behaviours the person is alleged to have engaged in. For this reason the allegations should refer to specific behaviours on specific occasions. For example, it is not sufficient to state that the allegation is that the person has breached s13(3) of the Code without describing the behaviours that are of concern.

Nor should the allegations be presented as assertions about the individual's personality or character, for example, that he or she is an aggressive and angry individual. In the absence of examples of specific behaviour it is not possible to prove or disprove assertions about an individual.

Allegations should link specific behaviours, that the investigator is able to gather evidence about, to specific breaches of the Code. For example, 'on [a named date and place, person X] by raising their voice, used threatening language towards a colleague and appeared to be angry and in doing so is alleged to have breached s13(3) of the APS Code of Conduct.'

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14. Investigator training programs

14.1 Knowing that an external investigator has attended a relevant training program can provide some reassurance of the skills of the investigator.

14.2 There are investigation skills training programs which could be useful and worth considering in evaluating a contractor's skills. These include competency based training in investigations, particularly with respect to fraud control,[83] and training in investigations and administrative decision-making offered by law firms.

14.3 For example, the Australian Government Solicitor offers courses for APS employees who have a role in determining whether a breach of the code of conduct has occurred, when and how suspension from employment should be managed and the imposition of a sanction [84] which focuses on the APS conduct framework. These courses have been assessed by the APSC as appropriately covering the conduct framework and the responsibilities of investigators and decision-makers and for this reason is endorsed. This endorsement does not cover the learning experience or the quality of the facilitator.

[83] The Department of the Attorney-General has information about fraud control and investigations training on its website and links to other sites that provide information on courses at: www.ag.gov.au/CrimeAndCorruption/FraudControl/Pages/default.aspx

[84] www.ags.gov.au/training/training-calendar.html

15. Further information

15.1 The Ethics Advisory Service within the Commission is available to all APS employees. This includes human resource practitioners and managers who are managing investigations of suspected misconduct, who wish to discuss and seek advice on ethical issues which occur in the workplace, and make sound decisions around these issues.

15.2 The Ethics Advisory Service may be contacted on 02 6202 3737 or by email at ethics@apsc.gov.au.

15.3 The Commission has published a range of guidance on the APS Values, Employment Principles, and the Code and related matters. These publications are available from the Commission's website www.apsc.gov.au.

15.4 Of particular relevance is *APS Values and Code of Conduct in practice*.[85]

15.5 From time to time the Commission also releases circulars and advices about specific aspects of reporting or managing suspected misconduct in the workplace. These are available from www.apsc.gov.au/publications-and-media/circulars-and-advices.

15.6 As mentioned throughout this appendix, the Administrative Review Council has published better practice guides on administrative decision-making which explain the elements of making sound and lawful administrative decisions. Those guides are available at www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx.

15.7 Further information on contract management and the CPRs is available at the Finance procurement website www.finance.gov.au/procurement/index.html.

15.8 The Finance website includes a number of tools that may assist agencies conduct streamlined procurement activities. This includes a standard contracting suite and procurement process map for low valued procurements.

Cooperative procurement

15.9 The contact details of three agencies that have in place a panel for investigation services are as follows:

Australian Taxation Office (ATO)

Panel Name: Administrative Investigations and Review Services.

Contact ATO Helpline: 13 15 50

[85] http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct

A request for details on the investigator panel arrangements will be escalated to the ATO Code of Conduct area.

Department of Agriculture

Panel Name: Investigation of Misconduct Allegations.

Contact Procurement Advice and Operations Team: Procurementhelpdesk@daff.gov.au

ATTACHMENT A TO APPENDIX 6

Contacting referees to verify investigator credentials

Checking an investigator's credentials with referees is an important part of the process for choosing an investigator. Questions to ask referees could include:

Understanding of the legal and administrative decision-making framework

- Did you have confidence in the investigator's understanding of the APS misconduct framework and associated administrative law framework?

General abilities

- Did the employee under investigation challenge the investigator's approach? If so, how did the investigator handle it?
- Did you have confidence in the investigator's discretion and professionalism?
- Was the investigation timely and did it represent value for money?

Note: Agencies may have a misconduct matter that requires specialist skills or is particularly complex, for example a case with conflicting evidence and multiple witnesses. This will require more focused questioning of referees about the complexity of the matters the investigator has dealt with.

Procedural matters

- Did the investigator understand the importance of, and comply with, your agency's s15(3) procedures for investigating suspected misconduct?
- Did any part of the investigation need to be redone because of a procedural concern with the investigator's approach?
- Did any problems arise concerning procedural fairness? How was this handled?

Outcomes

- Did the investigator provide a logical, well-reasoned report?
- Did you have confidence in the investigator's conclusions and recommendations?
- Did the investigator deliver the specified services to the required quality and timeliness?
- Was the process or outcome challenged, for example with an application to the Merit Protection Commissioner, Fair Work Commission, courts or tribunals?
- What was the outcome of any challenges, including if the matter was settled out of court?
- Was the outcome or the decision to settle in any way reflective on the role of the investigator?

APPENDIX 7

Initial consideration of suspected misconduct checklist

Receiving a report of, or dealing with an incident of, suspected misconduct

☐ Is the report of suspected misconduct covered by the *Public Interest Disclosure Act 2013* (PID Act)? If so, has the matter been referred to an authorised officer for appropriate action?

- The agency should take appropriate measures to ensure that its employees comply with the PID Act, including the requirement for supervisors to refer disclosures to the agency's authorised officer in who has responsibility for assessing how the disclosure is to be managed.

☐ If not a PID, has the matter been referred to the appropriate person in the agency who has responsibility for assessing how the suspected misconduct is to be managed?

☐ Have appropriate measures been taken to treat the information confidential?

☐ Have appropriate measures been taken to protect the employee reporting the suspected misconduct from reprisal?

☐ If required, has action been taken to protect the safety and wellbeing of employees and clients, and to protect the security of evidence that may be required in the investigation process?

☐ If the suspected misconduct is serious, has the matter been referred to the appropriate authorities, for example, the police or internal fraud investigation area?

☐ If appropriate, has re-assignment of duties or suspension of the employee suspected of misconduct been considered?

☐ Have appropriate records been made of action taken, conversations and meetings?

☐ Has management of the impact in the workplace of the reported behaviour, and, if appropriate, the investigation and the outcome of the investigation been considered?

☐ If the suspected misconduct became the subject of public comment, has appropriate action been taken to respond to that public comment or other action been taken, for example, to protect the reputation of the agency or the Australian Public Service (APS)?

Considering a report of suspected misconduct

☐ If the suspected misconduct was disclosed under the PID scheme, has the disclosure been actioned in accordance with the PID Act requirements?

- The PID investigation could be a preliminary assessment of whether the suspected misconduct should be subject to a Code of Conduct investigation in accordance with the agency's s15(3) procedures. See Appendix 3 *Interaction between the Australian Public Service Code of Conduct and the Public Interest Disclosure Act* of this guide for further information.

☐ Where the suspected misconduct raises concerns that relate both to effective performance and a potential breach of the Code, has the APS Commissioner's guidance on this matter been considered as required by section 40 of the *Australian Public Service Commissioner's Directions 2016*? The guidance is in *Relationship between misconduct and performance management processes* in Part II, Section 5 of this guide.

☐ Where the suspected misconduct does not relate to serious misconduct, have alternative methods of addressing the behaviour been considered?

- For example, warning the employee that continuation of inappropriate behaviour may result in further action such as a misconduct investigation, giving a direction about appropriate behaviour, monitoring or closely supervising the employee, counselling, mediation, or learning and development.

☐ To enable consistency of approach in the agency, have agency behavioural standards or agency guidance material on handling misconduct been considered?

☐ If a former employee is suspected of misconduct, in deciding whether to investigate the matter have the following matters been considered

- availability of and access to evidence
- what public interest there is in investigating the matter
- the implications for maintaining proper standards of APS conduct and public confidence in the integrity and reputation of the agency or the APS if the matter is not investigated?

☐ If the matter is to be investigated under the agency s15(3) procedures, has a decision-maker been appointed, or otherwise authorised, in accordance with those procedures?

APPENDIX 8

Employee suspension checklist

Matters for consideration by the suspension decision-maker and action required to enable the suspension[86]

Preliminary considerations

☐ Have you been delegated the power to suspend the employee consistent with regulation 9.3 of the *Public Service Regulations 1999* (PS Regulations) and agency policies?

- If you are not an Australian Public Service (APS) employee, has the delegation been approved by the Australian Public Service Commissioner consistent with regulation 9.3(4) of the PS Regulations?

☐ Have you been involved in any related inquiry under the agency's s15(3) procedures?[87]

☐ Have you declared any potential conflicts of interest? See *Independent and unbiased decision-maker* in Part II, Section 6.1 of this guide.

☐ Are you personally satisfied that you will be able to bring an independent and unbiased mind to this matter and that a reasonable bystander would agree?

Deciding whether or not to suspend

☐ Do you believe on reasonable grounds that the employee has, or may have, breached the APS Code of Conduct (the Code), and that it is in the public interest, or the agency's interest, to remove the employee from the workplace?

For example,

- does the alleged conduct pose a risk to
    - the safety of staff, clients or customers
    - the integrity of information held by the agency
    - Commonwealth resources or public revenue
    - the confidence of the public in the administration of the agency or the APS as a whole, especially in the case of more serious suspected misconduct?
- Is there a risk that:

[86] See *Deciding whether to reassign duties or suspend the employee* in Part II, Section 5.8 of this guide.

[87] A suspension decision-maker may make necessary inquiries to determine if suspension is appropriate in the circumstances. This may include informing themselves of the results of any preliminary investigations, whether for *Public Interest Disclosure Act 2013* or Code purposes. To avoid the perception of bias and avoid any real or apparent conflicts of interest it is good administrative practice for the suspension decision-maker not to be involved in the related investigation under the agency's s15(3) procedures.

- the evidence in relation to the alleged misconduct will be compromised if the employee remains in the workplace
- the alleged misconduct will be repeated?

☐ Has re-assignment of duties or alternative management action been considered?

When imposing suspension

☐ Have you decided if the suspension will be with or without remuneration?

Generally, suspension without remuneration would be appropriate for serious cases, for example, where a potential appropriate sanction would be termination of employment if a breach of the Code is determined.

☐ Have you provided the employee an opportunity to make a statement before the suspension decision is made? [88]

☐ Where you consider that there is an immediate need for the employee to be removed from the workplace before any suspension decision is made, have you considered the following options:

- inviting the employee to seek leave, and granting the leave in line with your agency's arrangements, for example miscellaneous leave with pay
- providing the employee an opportunity to work from home for a specified period, in accordance with your agency's arrangements and s25 of the PS Act, to prepare a statement before the suspension decision is made?

☐ If, before the suspension decision is made, you are satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate to give the employee an opportunity to comment, have you

- recorded, before the suspension decision is made, your reasons for this, and
- advised the employee accordingly and given the employee an opportunity to make a submission immediately after the suspension decision was made?

☐ Have you considered how you will discharge your obligation under regulation 3.10(4) of the PS Regulations to review the suspension at reasonable intervals and advised the employee when you propose to review the suspension?

- A review of the suspension decision may be conducted at the request of the employee if, for example, the employee raises matters relevant to hardship where suspension is without remuneration.

☐ Has the employee been advised of what has been decided in respect of work-related events during the suspension such as training courses already booked and entitlement to

[88] Regulation 3.10(7) requires an agency head to have regard to procedural fairness when making decisions about suspension unless the agency head is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate.

apply for APS vacancies, and other work-related matters such as access to work premises?

- ☐ Has the employee been advised of his or her review rights under s33 of the PS Act and Part 5 of the Regulations?

Where suspension is without pay

- ☐ Has the employee been given reasonable opportunity to comment on any proposal to suspend without pay, including on any issues of hardship, before any decision is made to suspend without pay?
- ☐ Has the employee been advised about possible access to leave credits?
- ☐ Has the employee been advised about whether he/she may seek outside employment and whether prior approval of the agency is required?
- ☐ If the period of suspension without pay is proposed to be longer than 30 days, are there exceptional circumstances that apply?

During suspension

- ☐ Are you reviewing the suspension at reasonable intervals?
- ☐ Have you invited the employee to make a submission to those reviews?

Where it is determined that the employee suspended without pay has not breached the Code of Conduct

- ☐ Is salary forgone during suspension to be reinstated or is there a case for not doing so, for example, the employee received earnings from outside employment?
- ☐ Is it appropriate to re-credit any paid recreation leave or long service leave taken during suspension?

Reasons for ending the suspension

- ☐ Has a sanction been imposed on the employee for the relevant breach? See regulation 3.10(6) of the PS Regulations. **or**
- ☐ Do you no longer believe that the employee has or may have breached the Code? See regulation 3.10(5)(a) of the PS Regulations. **or**
- ☐ Do you no longer believe that the suspension is in the public interest or in the agency's interest? See regulation 3.10(5)(b) of the PS Regulations.

At the conclusion of the period of suspension

- ☐ Has the appropriate documentation in relation to ceasing suspension been completed and all relevant documents placed on record?

APPENDIX 9

Making a decision about a breach of the Australian Public Service Code of Conduct checklist[89]

Preliminary considerations

- ☐ Have you been properly appointed or otherwise tasked by your agency head or authorised person in line with your agency's s15(3) procedures?[90]
- ☐ Have you declared any potential conflicts of interest? See *Independent and unbiased decision-maker* in Part II, Section 6.1 of this guide.
- ☐ Are you personally satisfied that you will be able to bring an independent and unbiased mind to this inquiry and that a reasonable bystander would agree?
- ☐ Have you read your agency's s15(3) procedures and other guidance material?
- ☐ Where relevant, have you familiarised yourself with your agency policy, procedures or guidelines for dealing with fraud?
- ☐ Have you decided how the matter is to be investigated? See *Investigative process* in Part II, Section 6 of this guide for further information.

    - If an external investigator is being considered, see Appendix 6 *Australian Public Service Code of Conduct: Tips and traps in selecting external investigators* of this guide
    - When deciding who will investigate the suspected misconduct care needs to be taken not to breach the privacy protections under the *Privacy Act 1999* or the non-disclosure obligations under the *Public Interest Disclosure Act 2013*.

- ☐ Is the scope of the investigation clearly defined? See *Deciding the Scope of the investigation* in Part II, Section 6.2 of this guide for more information. Agency guidance material or agency HR managers may be available for further guidance.
- ☐ If you are being assisted by an investigator, are you appropriately supervising the investigator's conduct of the investigation and appropriately involved in the investigation, noting that the conduct of the investigation and the making of findings of

[89] This checklist is designed to assist persons appointed under an agency's s15(3) procedures to make a determination about whether an employee, or former employee, that is the person suspected of misconduct, has breached the Code. Separate guidance, and a checklist, is available at Appendix 7 concerning initial consideration of suspected misconduct and whether to initiate action under those procedures. This checklist is consistent with the requirements in Part 5 of the *Australian Public Service Commissioner's Directions 2016* but is subject to any additional requirements under an agency's s15(3) procedures.

[90] Under s15(3) of the *Public Service Act 1999*, each agency head establishes mandatory procedures for investigating suspected misconduct in their agency.

fact and findings about breach of the Code are your responsibility?[91] For example has the investigator been provided guidance on:

- what alleged conduct is to be investigated and which element(s) of the Code may have been breached? See *Deciding on the Scope of the investigation* in Part II, Section 6.2 and Appendix 5 *Elements of the Australian Public Service Code of Conduct* of this guide for more information.
- the likely witnesses or where other evidence may be available?

Advice to the person suspected of misconduct

☐ Have you, in line with your agency's s15(3) procedures, ensured that the person suspected of misconduct has been advised of:

- the inappropriate actions or behaviours they are suspected of committing? That is, have they been provided with clear advice about the nature of the act, or acts, that they are suspected of having committed?
    - If during the investigation it becomes clear that the actions or behaviours they are suspected of committing changes, the person should be informed of these before a determination is made about breach.
- the element(s) of the Code they are suspected of breaching?
    - If during the investigation it becomes clear that the element(s) of the Code that the person is suspected of breaching changes[92], the person should be informed of these before a determination is made about breach.
- the sanctions that may be imposed under s15(1) of the PS Act?
- if you are being assisted in running the inquiry, who will be providing you that assistance?
- that you will be making the determination?
- how the process is expected to proceed in accordance with the agency's s15(3) procedures such as providing them with a copy of the agency's guidance material and procedures?

[91] This statement about the responsibility of the breach decision-maker is subject to any contrary provisions of the agency's s15(3) procedures

[92] For example, if additional elements of the Code are being considered, or if it becomes clear that other, more relevant, elements should be considered instead.

Gathering the evidence and evaluating the facts

☐ Before making your final determination have you ensured that the person suspected of misconduct has been provided with a reasonable opportunity to make a statement in relation to the suspected breach?[93]

☐ In particular, has the person suspected of misconduct been given adequate notice of all material of which you are aware and which is credible, relevant and significant to the proposed breach decision?

- This includes any such material which could assist the person in answering the case against them, even though you do not propose to rely on the material in making particular findings or decisions adverse to the person?

☐ Have you only taken into account evidence that is relevant, credible and probative in relation to each material finding of fact?

☐ Have you ensured that appropriate witnesses have been questioned and any conflicting witness statements or conflicting evidence verified or otherwise checked?

☐ Have you ensured that any explanations, or evidence, provided by the person suspected of misconduct or witnesses have been appropriately tested and given proper weight?

☐ Are you satisfied there is no relevant evidence that has not been taken into account and there is enough reliable evidence to be able to draw a reasonable conclusion on the balance of probabilities?[94]

☐ Has the person suspected of misconduct been given a reasonable opportunity to respond to new credible, relevant and significant material which has emerged since a previous notice to the person?

Reviewing the evidence and writing the investigation report

☐ Does the investigation report:

- outline the nature of the suspected misconduct, that is the suspected inappropriate actions or behaviours
- identify relevant legislation and policy material or guidelines or other agency practices you took into account
- set out the steps taken to collect evidence and information
- outline the evidence and present it in a balanced way, that is including evidence both for and against the person, including the accused person's

[93] Procedural fairness requires the person to be sufficiently advised of the nature of the case against him or her to respond properly to the allegations. See *Investigating whether misconduct has occurred* in Part II, Section 6.4 of this guide.

[94] The required degree of satisfaction on the balance of probabilities increases in accordance with the seriousness of the matter under consideration. See *Standard of Proof* in Part II, Section 7.2 of this guide.

response to the allegations and the person's response to any new or conflicting evidence that was uncovered in the course of the investigation
- outline the conclusions or findings on material questions of fact made on the available evidence including any inconsistencies in the evidence or issues that remain unclear. These conclusions need to flow logically from the evidence that has been collected and considered.
- how all the relevant elements of the Code were considered and reasons why the action or behaviour did, or did not, amounted to a breach of the element or elements of the Code?

Preparing a decision record

☐ Have you made a written record of your decision?

☐ Does the decision record comply with the agency's s15(3) procedures? Any statement of reasons for the breach decision could include:

- a summary of the evidence you took into account in making your decision and any evidence or established facts that were not taken into account and reasons why you did not consider that evidence relevant
- your findings of fact on the balance of probabilities about what happened, that is the act or acts suspected of being misconduct
- your decision as to whether those act or acts amount(s) to misconduct, and, if so, which elements of the Code have been breached and why.

In summary, you need to include any detailed background to the making of your decision so that the person suspected of misconduct can understand your reasoning. Your decision may also be reviewed by the Merit Protection Commissioner, or other external bodies, so it is good practice for your decision process and the evidence and facts you relied to be clearly identifiable. For further information see *Preparing a decision report* in Part II, Section 7.2 of this guide.

Advising person suspected of misconduct of the outcome of investigation

☐ Have you considered what would be the best way to advise the person suspected of misconduct of your decision?[95]

[95] The employee, or former employee, should usually be informed of the decision. Section 44 of the *Australian Public Service Commissioner's Directions 2016* requires that the employee must be notified of the breach decision before any sanction may be imposed. In most cases, this would be expected to be done in person with the employee concerned, providing an opportunity to explain the decision and the consequences of it for the employee. It may be appropriate to allow the employee to have a support person at the meeting. A meeting of this kind would generally be additional to providing them with a copy of the decision and the report on which it was based.

- ☐ Where you have determined that there has been a breach of the Code, have you considered what would be the best way for the employee fund to have breached the Code to be given notice of matters relevant to any potential sanction consistent with your agency's s15(3) procedures?
- ☐ Have you notified the person found to have breached the Code of any right to seek review of your determination under s33 of the PS Act, noting that seeking a review will not operate to stay the imposition of the sanction?[96]
- ☐ If the evidence does not support a decision that there has been a breach of the Code, have you informed the person suspected of misconduct of your conclusion?

Next Steps

- Where it has been determined that an employee has breached the Code, the next stage is to refer the case to the sanction decision-maker to determine if a sanction or sanctions are to be imposed and/or if other administrative action is to be taken. It may be the responsibility for line managers to determine whether administrative action is to be taken.
- It is appropriate for the employee found to have breached the Code to be informed of the name of the person who has been given the authority to determine any sanction(s) and what the next steps of the process will involve.
- Where the misconduct came to light through an allegation made by, for example, another employee, that employee can be informed of the outcome of the investigation in accordance with agency guidance material and taking into account the requirements of the *Privacy Act 1988* and the *Public Interest Disclosure Act 2013*.
- Where it has been determined that an employee has not breached the Code, consideration should be given to whether any remedial action is needed such as training/development, performance management measures or changes to processes and systems, or whether there is a need to address any issues within the work environment arising from the initial complaint. For example mediation or openly discussing issues of concern within the workplace.

[96] A Senior Executive Service employee has no right of review under s33 and the relevant regulations.

APPENDIX 10

Sanction decision-making checklist

Matters for consideration when making a decision about imposing a sanction following a determination that an employee has breached the Code

Preliminary considerations

☐ Do you have the power to make the sanction decision?

Have you been delegated the role of sanction decision-maker and relevant powers by the head of the agency consistent with your agency's policies and s78 of the Public Service Act? Have you been delegated powers to impose the sanction e.g. transfer at level, reduction in classification or termination of employment? See *Sanction Delegate* in Part II, Section 7.4 of this guide.

☐ Have you declared any potential conflicts of interest that might arise from or in making a sanction decision?

☐ Are you satisfied that you will be able to bring an independent and unbiased mind to this inquiry and that a reasonable bystander would agree?

☐ Have you read your agency's s15(3) procedures and other guidance material? *Factors to be considered in determining the sanction* in Part II, Section 7.4 of this guide is also relevant

☐ Are you aware of the sanctions available under s15(1) of the Public Service Act?

☐ If you have any concerns that the determination of breach of the Code was not made in accordance with legal requirements, such as your agency's s15(3) procedures, have you raised this with the relevant person within your agency? See *The determination and sanction* Part II, Section 7 of this guide for more information. People delegated to impose a sanction are not generally able to remake determinations of breaches of the Code.

Advice to the employee who has breached the Code before making a decision

☐ Has the employee who has been found to have breached the Code been advised in writing

- that a determination has been made that he or she has breached the Code
- of the particular sanction(s) under consideration
- of the factors that are under consideration in determining any sanction(s)?

- ☐ Has the employee who has breached the Code been provided with a reasonable opportunity to make a statement in relation to the particular sanction(s) under consideration and the factors relating to it?

Matters for consideration in determining the sanction or sanctions

Further information on the matters for consideration in determining the sanction can be found in Part II, Section 7.5 of this guide.

Before deciding what sanction, if any, to impose, have you

- ☐ considered the nature and seriousness of the breach?
- ☐ considered the degree of relevance of the misconduct to the employee's duties?
- ☐ considered the likely impact on the reputation of the agency and the APS if the misconduct were a matter of public knowledge?
- ☐ considered whether the misconduct was uncharacteristic of the employee or whether there have been other similar findings of a breach of the Code?
- ☐ considered what other action has been taken to try to improve the behaviour of the employee? For example counselling, training or performance management within the last two years.
- ☐ considered any previous sanctions imposed for a similar breaches of the Code, if the employee has previously breached the Code?
- ☐ taken into account any remorse or willingness to take responsibility for the breach, or understanding of the seriousness of the breach, by the employee?
- ☐ taken into account other action that may have already been taken such as suspension from duty with or without remuneration?
- ☐ considered what sanction, if any, is necessary for the employee to understand the gravity of the situation and for you to be confident that they are unlikely to breach the Code again?
- ☐ considered any mitigating or extenuating factors, including any such factors raised by the employee? See *Mitigating Factors* in Part II, Section 7.4 of this guide.
- ☐ considered any information or guidance from your agency on sanction decisions to ensure consistency where circumstances are essentially similar? See *Consistency of sanctions* in Part II, Section 7.4 of this guide.
- ☐ considered other sources of information? If there is no information available about other cases from within your agency other sources of information could be your home agency, case studies of the Merit Protection Commissioner's case summaries and the APSC

Ethics Advisory Service[97], for example, may be able to provide you with information or advice about appropriate matters to consider when determining sanctions.

Preparing a decision record

☐ If you have decided to impose a sanction or sanctions, have you made a written record of your decision?

☐ Have you complied with any obligation in your agency's s15(3) procedures to provide a statement of reasons for your sanction decision, including such matters as your findings on material questions of fact, a reference to evidence or other material on which those findings are based, and reasons for your decision?[98] Reasons for your decisions could include such matters as

- your consideration of the range of sanctions available
- your consideration of any mitigating or extenuating circumstances raised by the employee.

☐ Does your decision set out clearly your reasoning for your decision so that the employee can understand why you have imposed the relevant sanction(s) and so that your decision may be properly understood in any subsequent review?

Advising the employee who has breached the Code of your decision

☐ Have you taken reasonable steps to inform the employee

- of your decision on the sanction(s) to be imposed, if any, consistent with relevant requirements in your agency's s15(3) procedures, and
- when the sanction or sanctions will take effect?

☐ Have you ensured that the employee has been advised of any right to seek review under s33 of the PS Act, or other review rights, of your decision, noting that seeking a review will not operate to stay the imposition of the sanctions?

[97] See http://meritprotectioncommission.gov.au/mpc-resources/summaries-of-cases-folder/case-summaries and http://www.apsc.gov.au/managing-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee/ethics-advisory-service for more information.

[98] The relevant factual findings are those which relate to sanction. You are bound by the findings made by the breach decision-maker as to what conduct was engaged in by the employee and whether this was a breach of the Code.